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Putting a Gag on Farm Whistleblowers: The Right to Lie and the Right to Reamin Silent Confront State Agricultural Protectionism

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PUTTING A GAG ON FARM WHISTLEBLOWERS: THE RIGHT TO LIE AND THE RIGHT TO REMAIN SILENT CONFRONT STATE AGRICULTURAL PROTECTIONISM

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ABSTRACT

Whistleblowers play an important role in filling gaps in government food safety systems. Unfortunately, several dominant food-producing states have pursued legislative initiatives that punish farm whistleblowers and silence investigative tactics. First, this research describes various state legislative initiatives that curb criticism of agriculture. The work analyzes the federal food safety system and how these protections limiting agricultural criticism contravene that food safety net. Further, the research analyzes the free

speech concerns in the newest protectionist laws. The analysis recommends strategies and future research to improve agriculture safety and protect free speech in an evolving food safety landscape.

I. INTRODUCTION

According to the U.S. Centers for Disease Control and Prevention, in the United States each year forty-eight million people will be sickened from food borne illness.[1] Of those, 128,000 will be hospitalized and three thousand will die.[2] Although the government provides food safety standards and inspectors, there are gaps in the system.[3] Whistleblowers play an important role in filling those gaps to improve food safety.[4] In 2008, a whistleblower report of animal abuse and food safety violations led to the

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1. *CDC Estimates of Foodborne Illness in the United States*, CNTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html (last updated Jan. 8, 2014).

2. *Id.*

3. *See* Brief for Reporters Committee for Freedom of the Press et al. as Amici Curiae Supporting Plaintiffs at 4, Animal Legal Def. Fund v. Herbert, No. 2:13-cv-00679-RJS (D. Utah Jan. 15, 2014) (No. 49), *available at* http://www.rcfp.org/sites/default/files/RCFP_Amicus_ALDF.pdf (citing *Continuing Problems in USDA's Enforcement of the Humane Methods of Slaughter Act: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight & Gov't Reform*, 111th Cong. (2010)).

4. *Id.* at 2-3.

largest beef recall in history.[5] Moreover, despite improved technology and evolving best practices, incidence of foodborne illness is still pervasive.[6]

Food producers play a major role in self-identifying food contamination hazards in the U.S. food safety system.[7] Such a system would seem to require individuals on farms and in food production facilities be free to investigate and report potential concerns about animal treatment or crop handling. Unfortunately, several dominant food-producing states have pursued legislative initiatives that in effect would punish farm whistleblowers and silence investigative tactics. These protectionist measures are the subject of this research.

Part II of this analysis describes various state legislative initiatives that curb criticism of agriculture. These laws take different forms and are broadly characterized as agricultural protectionism herein. Part III explains the federal food safety system and how protections limiting agricultural criticism contravene that food safety net. Part IV points out inconsistencies and recent events that make it unclear whether current federal policy favors agricultural protectionism or food safty. Part V analyzes the free speech concerns that agriculture protectionism spawns. This constitutional discussion focuses on the newest protectionist laws that criminalize lying to get a farm job and whether they violate a whistleblower's "right to lie." Additionally, it evaluates First Amendment concerns with new measures mandating employee prompt disclosure of farm animal safety violations. Finally, the analysis recommends strategies and future research to improve agriculture safety and protect free speech in an evolving legal landscape.

II. AGRICULTURE PROTECTIONIST LEGISLATION

Agriculture protectionism has taken various forms in the last quarter century. Legislative initiatives have changed over time in response to public criticism, especially about infringed free speech rights, but also in response to food safety concerns that can get suppressed when unhealthy farm practices are protected from scrutiny. This Part highlights various protectionist legislation to reveal an ever-changing legal landscape.

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5. David Brown, *USDA Orders Largest Meat Recall in U.S. History*, WASH. POST (Feb. 18, 2008), http://www.washingtonpost.com/wpdyn/content/article/2008/02/17/AR2008021701530.html.

6. *See Trends in Foodborne Illness in the United States, 2012*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/features/dsfoodnet2012/reportcard.html (last updated Apr. 18, 2013).

7. *See infra* notes 121-25 and accompanying text.

A. First Generation Protections

Statutory rights to farm have been around for decades in all fifty states.[8] Historically, these laws have been used to shield farmers from neighbors' nuisance suits.[9] In some instances, these protections were so expansive that courts struck them down as unconstitutional takings of plaintiffs' properties.[10]

Another example of state protectionist legislation emerged during the 1990s. After Washington apple growers failed in a common law product disparagement case against CBS over a critical segment on *60 Minutes,*[11] twelve states passed civil food libel laws to address perceived shortcomings in the common law when public criticism about food safety stems public demand for the product.[12] These laws have been widely criticized as unconstitutional infringements on free speech.[13] Nevertheless, they remain on the books in

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8. Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103, 103 (1998).

9. *Id.* at 104.

10. *See, e.g.*, Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 171 (Iowa June 16, 2004); *see also* Emily A. Kolbe, Note, *"Won't You Be My Neighbor?" Living with Concentrated Animal Feeding Operations*, 99 IOWA L. REV. 415, 429 n.90 (2013) (citing Carrie Hribar, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*, NAT'L ASS'N OF LOCAL BDS. OF HEALTH, 11-12 (2010), *available at* http://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf).

11. *See* Auvil v. CBS "60 Minutes," 67 F.3d 816 (9th Cir. 1995) (per curiam).

12. ALA. CODE §§ 6-5-620 to -625 (2011); ARIZ. REV. STAT. ANN. § 3-113 (2011); COLO. REV. STAT. § 35-31-101 (2007); FLA. STAT. § 865.065 (2011); GA. CODE ANN. §§ 2-16-1 to -4 (2005); IDAHO CODE ANN. §§ 6-2001 to -2003 (2008); LA. REV. STAT. ANN. §§ 3:4501–4504 (2011); MISS. CODE ANN. §§ 69-1-251, -253, -255, -257 (1999); N.D. CENT. CODE §§ 32-44-01 to -04 (2008); OHIO REV. CODE ANN. § 2307.81 (West 2011); OKLA. STAT. tit. 2, §§ 5-100 to -102 (2003); S.D. CODIFIED LAWS § 20-10A-1 to -4 (2011); TEX. CIV. PRAC. & REM. CODE ANN. §§ 96.001–.004 (West 2005). For analysis of the different standards of proof in the twelve state food libel laws, *see* Rita Marie Cain, *Food Inglorious Food: Food Safety, Food Libel and Free Speech,* 49 AM. BUS. L.J. 275 (2012); *see also* Marianne Lavelle, *Food Abuse Basis for Suits,* NAT'L L.J., May 5, 1997, at A01 (claiming that 1960s' critics of the pesticide DDT would be liable under standards of proof in food libel laws).

13. *See* Cain, *supra* note 12, at 307-10; Ronald K.L. Collins, *Free Speech, Food Libel, & the First Amendment . . . in Ohio*, 26 OHIO N.U. L. REV. 1, 2 (2000); Howard M. Wasserman, *Two Degrees of Speech Protection: Free Speech Through the Prism of Agricultural Disparagement Laws*, 8 WM. & MARY BILL RTS. J. 323, 323 (2000); Lisa Dobson Gould, Comment, *Mad Cows, Offended Emus, and Old Eggs: Perishable Product Disparagement Laws and Free Speech*, 73 WASH. L. REV. 1019, 1019 (1998); Kevin A. Isern, *When Is Speech No Longer Protected by the First Amendment: A Plaintiff's Perspective of Agricultural Disparagement Laws*, 10 DEPAUL BUS. L.J. 233, 253-55 (1998).

all twelve states and the South Dakota statute currently is at issue in a $1.2 billion disparagement case against ABC News and others.[14] This analysis will not address food libel laws further, except to the extent that recommendations discussed below apply to them, as well as to other state protectionist efforts.

At the same time the food libel laws were emerging from state legislatures, the first generation of "ag-gag" laws appeared.[15] These laws generally concerned trespass and harm to property at animal facilities and properties with field crops.[16] Additionally, however, they criminalized unauthorized photographing or recording at the agriculture facility.[17] In

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14. Beef Prods., Inc. v. Am. Broad. Companies, Inc., 949 F. Supp. 2d 936 (D.S.D. 2013). On March 7, 2012, ABC broadcast a segment on its evening news program about the product which BPI calls "lean finely textured beef" (LFTB). Thereafter, ABC broadcasted eleven follow up reports and numerous online communications about the product and its manufacturer, repeatedly referring to LFTB as "pink slime," a term originally coined by USDA microbiologist Gerald Zirnstein, who appeared in the original ABC segment and is also a defendant in the case. Daniel P. Finney, *Beef Products Inc. Sues ABC for Defamation Over 'Pink Slime'*, DESMOINESREGISTER.COM (Sept. 14, 2012), http://www.desmoinesregister.com/apps/pbcs.dll/article?AID=/20120914/NEWS/309140042&template=printart. BPI v. ABC News, Inc., Civ. 12-292 (1st Jud. Cir. S.D. Mar. 27, 2014) (memorandum decision), *available at* http://beefisbeef.com/assets/content/Memorandum_Decision_03272014_(2).pdf. Most of BPI's claims have been held over for trial. Only BPI's common law claim for product disparagement was dismissed, on the ground that it is preempted by the statutory food libel claim. *Id.* at 8-9.

15. Journalist Mark Bittman coined the term "ag-gag" in 2011 for legislation that heightens legal risks for undercover reporters, agriculture workers, or citizen bystanders who wish to document and report instances of animal abuse or food safety violations. Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES (Apr. 26, 2011, 9:29 PM), http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/?_php=true&_type=blogs&_r=0. The label stuck in traditional journalism and popular media. *See, e.g.*, *Animal Cruelty: Attacking the Messenger*, BOS. GLOBE (Apr. 15, 2013), http://www.bostonglobe.com/editorials/2013/04/14/put-gag-gag-laws/w233JSpwLS0pPo1Me2K5aO/story.html. *See also Wrong Way to Get Rid of Cattle Abuse, Illness: Editorial*, L.A. DAILY NEWS (Apr. 8, 2013, 12:01 AM), http://www.dailynews.com/general-news/20130408/wrong-way-to-get-rid-of-cattle-abuse-illness-editorial; *The Daily Show with Jon Stewart: Blowing the Whistle on Whistleblowers* (Comedy Central television broadcast June 11, 2013), *avaialable at* http://www.thedailyshow.com/watch/tue-june-11-2013/blowing-the-whistle-on-whistleblowers.

16. *See, e.g.*, KAN. STAT. ANN. § 47-1827(c) (2013) (effective 1990).

17. *See* Kevin C. Adam, Note, *Shooting the Messenger: A Common-Sense Analysis of State "Ag-Gag" Legislation Under the First Amendment*, 45 SUFFOLK U. L. REV. 1129, 1157-63 (2012); Lewis Bollard, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10960,

1990-1991, Kansas, North Dakota, and Montana passed the first of such laws.[18] The Kansas version requires that the recording be made with intent to harm.[19] North Dakota requires no specific intent.[20] Conceivably, a person could be charged for taking a picture of a friend on a North Dakota farm if he or she failed to get permission first.

The scope of Montana's law is the narrowest.[21] Like Kansas, Montana requires intent to damage the enterprise, but further requires an intent to commit criminal defamation, which occurs when a person communicates defamatory matter to a third party, which exposes the victim to ridicule, disgrace, or injury to his or her business, with the knowledge of its defamatory character and without consent of the subject.[22] Communication that is otherwise defamatory is justified, however, if "the defamatory matter is true [or if] the communication consists of fair comment made in good faith with respect to persons participating in matters of public concern."[23] Accordingly, this robust intent requirement should only apply to those reporters who intentionally misrepresent the activities at a facility.[24] The criminal defamation intent requirement makes the Montana law the most narrowly tailored of all the ag-gag laws to date.[25] But for the criminality, it harkens to the civil food libel laws that were passed in the same time frame, all of which require falsity and disparagement.[26]

10962-66 (2012); Laura Hagen, *2012 State Legislative Review*, 19 ANIMAL L. 497, 510-15 (2013); Sonci Kingery, Note, *The Agricultural Iron Curtain: Ag Gag Legislation and the Threat to Free Speech, Food Safety, and Animal Welfare*, 17 DRAKE J. AGRIC. L. 645, 656-64 (2012); Jessalee Landfried, *Bound & Gagged: Potential First Amendment Challenges to "Ag-Gag" Laws*, 23 DUKE ENVTL. L. & POL'Y F. 377, 391-400 (2013); Jessica Pitts, Note, *"Ag-Gag" Legislation and Public Choice Theory: Maintaining a Diffuse Public by Limiting Information*, 40 AM. J. CRIM. L. 95, 97-103 (2012).

18. Like the Kansas law, North Dakota's act prohibits trespass and damage to or theft of property at animal facilities, *see* N.D. CENT. CODE §§ 12.1-21.1-01 to -05 (2013) (effective 1991) (including a Category One – No Recording provision). *See id.* § 12.1-21.1-02; *compare* N.D. CENT. CODE § 12.1-21.1-02.1-.5, .7 *with* N.D. CENT. CODE § 12.1-21.1-02.6.

19. KAN. STAT. ANN. § 47-1827(c).

20. *See* N.D. CENT. CODE § 12.1-21.1-02.

21. *See* MONT. CODE. ANN. § 81-30-103(2)(e) (2013) ("A person who does not have the effective consent of the owner and who intends to damage the enterprise conducted at an animal facility may not: . . . enter an animal facility to take pictures by photograph, video camera, or other means with the intent to commit criminal defamation.").

22. *Id.* § 45-8-212(1)-(2) (2013).

23. *Id.* § 45-8-212(3)(a), (c).

24. *Id.* (justifying otherwise defamatory speech).

25. *Id.*

26. *See* Cain, *supra* note 12.

No one was ever prosecuted under any of these first generation ag-gag laws and the agricultural protectionist movement was quiet for a generation thereafter. Recently, however, additional states have enacted "ag-gag" laws, and others have considered similar legislation.[27] These evolving efforts to protect farms from scrutiny have gotten increasingly creative and have made recognizing and grouping ag-gag legislation a dynamic process. Nevertheless, understanding this protectionist evolution helps to reveal the safety and free speech concerns that are discussed below. The remainder of this Part will explain the evolution of these state ag-gag laws and their enforcement.

B. Categories of State Ag-Gag Laws

For purposes of this analysis, a definition of what makes a law an ag-gag statute, as opposed to some other agricultural protectionism, is useful. This article defines ag-gag laws as any that would chill good faith undercover investigating or reporting of abuse or safety violations by an employee or citizen at agricultural facilities with the force of criminal law. Prior authors have suggested categorization schemes for ag-gag laws, and this analysis modifies those classifications, particularly to encompass the newest enactments.[28] Thus far, the majority of ag-gag legislation can be said to criminalize one or more of four categories of behavior: (1) recording, photographing, videotaping, or audio-recording at agricultural facilities [hereinafter "Category One - No Recording"]; (2) possession or distribution of recordings made on agricultural facilities[29] [hereinafter "Category Two - No Distributing"]; (3) dishonesty while applying for employment in order to gain access to a facility [hereinafter "Category Three - No Lying"]; and (4) failure to report recorded abuse and/or relinquish recordings within an extremely short timeframe [hereinafter "Category Four - Mandatory Disclosure"]. Some legislation has additional components, but all the ag-gag laws and bills discussed herein will fit within one or more of these categories. As will be seen next, Categories Three and Four, which are the

27. *See* Adam, *supra* note 17, at 1163-65.

28. *See* Adam, *supra* note 17, at 1131 (offering a three-part classification that maps onto the categories employed here up to this article's Category Four); Landfried, *supra* note 17, at 394, 398 (offering a five-part classification that maps onto the four categories presented in this article and adding a fifth called agricultural trespass); Bollard, *supra* note 17, at 10961 (limiting ag-gag laws to the variety in Categories One and Three of this article).

29. This type of ag-gag bill was proposed in earlier legislative sessions, though not prevalent in 2013-2014. *See* Adam, *supra* note 17, at 1164. Adam suggests that Category Two bills have fallen out of favor with ag-gag proponents due to mounting criticism of the category's overt constitutional weaknesses. *See id.* at 1173.

focus of most of this discussion, emerged after criticism about Categories One and Two.

C. The Evolution of Ag-Gag Enactments

The second wave of ag-gag enactments emphasized new ways to chill whistleblowing and undercover reporting.[30] Public outcry against second generation ag-gag legislation has been significant,[31] in part because of free speech implications, but also because of the glaring begged question: what do food producers have to hide?

Iowa ushered in the second generation of ag-gag legislation when it amended its existing "Offenses Relating to Agricultural Production" statutes[32] with a new crime entitled "Agriculture Production Facility Fraud."[33] Similar to first generation statutes, portions of Iowa's law address trespass and property damage at animal and crop facilities.[34] The addition of "Agriculture Production Facility Fraud," however, introduced Category Three - No Lying.[35] Iowa's law criminalizes (1) obtaining access to an agricultural production facility under false pretenses,[36] and (2) lying on a job

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30. While the earlier ag-gag laws were all Category 1 - No Recording, the 2012-2014 acts included multiple categories.

31. *See, e.g.*, Nicole M. Civita, *2012 Developments in Food Law and Policy*, 18 DRAKE J. AGRIC. L. 39, 91-92 (2013) ("According to an opinion poll by Lake Research Partners . . . '71 percent of Americans support undercover investigative efforts by animal welfare organizations to expose animal abuse on industrial farms, including 54 percent who strongly support the efforts.' Additionally, 64% 'of Americans oppose making undercover investigations of animal abuse on industrial farms illegal, with half of all Americans strongly oppose[d].'").

32. IOWA CODE §§ 717A.1-717A.4 (2015).

33. *Id.* § 717A.3A. *See* Letter from Terry E. Branstad, Governor, to Matt Schultz, Iowa Sec'y of State (Mar. 2, 2012), *available at* http://coolice.legis.iowa.gov/linc/84/external/govbills/HF589.pdf (providing a copy of the amendment signed into law).

34. IOWA CODE §§ 717A.2-717A.3.

35. Contrary to some sources, Iowa did not pass a Category One and Category Two ag-gag bill as well. *See, e.g.*, *Ag-Gag Laws*, SOURCEWATCH, http://www.sourcewatch.org/index.php/Ag-gag_laws#Iowa (last modified July 22, 2014). Indeed, Senate File 431 would have criminalized the creation, possession, and distribution of ag-facility recordings. *See* S.F. 431, 84th Gen. Assemb., 2011 Sess. Sec. 9, §§ 717A.2A.1.a-b (Iowa 2011), *available at* http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=BillInfo&Service=Billbook&menu=text&ga=84&hbill=SF431. It did not make it into the version of the bill signed by the governor, however. *See* Letter from Terry E. Branstad, Governor, to Matt Schultz, Iowa Sec'y of State, *supra* note 33; IOWA CODE § 717A (2015), *available at* https://www.legis.iowa.gov/docs/ico/code/717a.pdf.

36. IOWA CODE § 717A.3A.1.a.

application or agreement "with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized."[37]

While seemingly just one more state to adopt protectionist legislation, Iowa's ag-gag law represents a major addition to the legal landscape because of the state's significant agricultural productivity. According to the 2012 Agriculture Census, Iowa ranks second only to California in total agricultural sales, up fifty-one percent since the 2007 census.[38] Iowa ranks first in egg and soybean production, second for livestock sales and second for total crop sales.[39] Thus, when protectionist criminal laws chill the speech of Iowa whistleblowers about unsafe farm conditions, the negative impact on food safety is disproporationately heightened.

Shortly after Iowa's ag-gag bill became law, Utah enacted its new ag-gag crime, "Agricultural Operation Interference."[40] Utah's bill is part of its criminal code for property destruction.[41] It is a Category One - No Recording and Category Three - No Lying bill.[42] Utah criminalizes recording images or sounds at agriculture production facilities without permission[43] and criminalizes obtaining access to a facility under false pretenses.[44] Further, the law criminalizes applying for employment at an agricultural operation with the intent to create a recording when the applicant knows such recordings are prohibited, yet still creates one.[45] Thus, the law covers the undercover reporter who applies for a job expecting to record wrongdoing

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37. *Id.* § 717A.3A.1.b. A Category Four - Mandatory Disclosure-like provision, offering immunity for violations of agricultural trespass to those who turn over any recordings of suspected animal abuse to authorities within seventy-two hours of filming, did not make the final law. *See* Landfried, *supra* note 17, at 399 n.126 (referring to a proposed immunity provision).

38. Zoe Martin, *Iowa Leads Nation in Many Ag Production Sectors*, IOWA FARMER TODAY (Mar. 13, 2014), http://m.iowafarmertoday.com/news/crop/iowa-leads-nation-in-many-ag-production-sectors/article_63e4a5d6-aa01-11e3-9e9d-001a4bcf887a.html?mobile_touch=true.

39. *Id.*

40. The Iowa ag-gag bill was signed by the governor on March 2, 2012. *See* Letter from Terry E. Branstad, Governor, to Matt Schultz, Iowa Sec'y of State, *supra* note 33. Utah's governor signed his state's bill on March 20, 2012. *See* H.R. 187, 2012 Leg., Gen. Sess. (Utah 2012), *available at* http://le.utah.gov/~2012/bills/hbillenr/HB0187.pdf.

41. UTAH CODE ANN. §§ 76-6-101 to -112 (West 2014).

42. *Id.*

43. *Id.* § 76-6-112(2)(a) (knowingly or intentionally leaving a recording device to record an image or sound); *id.* § 76-6-112(2)(c)(iii) (recording images or sounds while employed and present); *id.* § 76-6-112(2)(d) (recording an image or sound while committing criminal trespass).

44. UTAH CODE ANN. § 76-6-112(2)(b).

45. *Id.* § 76-6-112(2)(c).

and the good faith employee who discovers wrongdoing at work, decides to document it and blow the whistle.

Later in 2012, Missouri passed its own Category Four - Mandatory Disclosure bill.[46] It makes it illegal for a "farm animal professional"[47] to fail to turn over to authorities within twenty-four hours any recordings of perceived animal abuse or neglect.[48] Additionally, Missouri's bill makes any intentional splicing, editing, or manipulation of the recording prior to submission a crime.[49]

Although several ag-gag bills were proposed in 2013, none became law.[50] Idaho broke the reprieve in February 2014 when it passed a Category One - No Recording and Category Three - No Lying law.[51] Among other things, "Interference with Agricultural Production"[52] makes it illegal to "obtain employment with an agricultural production facility by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility's. . . owners,. . . business interests or customers."[53] It also criminalizes entering an agricultural facility and, without the owner's express consent, making "audio or video recordings of the conduct of an agricultural production facility's operations."[54] Although the penalty is only a misdemeanor, it could carry a year of jail time.[55] Under this law a good faith employee could obtain employment without false pretenses, make a clandestine recording of wrongdoing on the premises and be subject to imprisonment.

D. Ag-Gag Litigation

Like the first generation of ag-gag laws, there is no record of prosecutions related to Iowa's and Missouri's second-generation bills. Utah

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46. *See* MO. REV. STAT. § 578.013 (2013) (approved by the governor July 9, 2012) (effective August 28, 2012).

47. A "farm animal professional" is defined as "any individual employed at a location where farm animals are harbored." *Id.* § 578.005(6).

48. *Id.* § 578.013.1.

49. *Id.* § 578.013.2 to .3.

50. *See infra* Part I.E.

51. *See* Dan Flynn, *Idaho Governor Signs 'Ag-Gag' Bill Into Law*, FOOD SAFETY NEWS (Feb. 28, 2014), http://www.foodsafetynews.com/2014/02/governor-otter-should-reconsider-idaho-ag-gag-bill-says-chobani-founder/#.UxOMs_RdWzc.

52. IDAHO CODE ANN. § 18-7042 (2014) (amending Chapter 70, Title 18 of the Idaho Code to include the ag-gag bill); *see also* S. 1337, 62d Leg., 2d Reg. Sess. (Idaho 2014), *available at* http://www.legislature.idaho.gov/legislation/2014/S1337.pdf.

53. *Id.* § 18-7042(1)(c) (including provisions for property damage and trespass).

54. *Id.* § 18-7042(1)(d).

55. *See id.* § 18-7042(3).

prosecuted one person who filmed a slaughterhouse worker pushing a cow with a bulldozer.[56] The charges were dropped, however, because the defendant was standing on public property adjacent to the facility when she made the recording.[57] Utah's law only covers recording while on the premises of the facility.[58] Thereafter, the previously charged defendant and several others filed a civil rights complaint challenging the Utah law.[59] They claim the Utah law violates First Amendment free speech rights, and also violates equal protection and due process under the Fourteenth Amendment.[60] The plaintiffs further claim the state law is preempted by the federal False Claims Act ("FCA") under the Supremacy Clause.[61] The federal FCA is designed for citizen watchdogs to blow the whistle on fraud, waste and abuse in government contracts.[62] The government contracts implicated in agricultural food protectionism involve food provided for school lunch programs.[63]

Idaho has yet to prosecute anyone under its new statute, but activists already have sued the state to enjoin enforcement of the Idaho law.[64] Many of the same plaintiffs are involved in both the Utah and Idaho civil cases and articulate most of the same complaints.[65] Like the Utah action, the Idaho civil case claims preemption based on the federal False Claims Act, but also

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56. *See* Complaint at 9-10, Animal Legal Def. Fund v. Herbert, No. 2:13-cv-00679-RJS (D. Utah July 22, 2013) [hereinafter *ALDF Complaint*], *available at* http://www.law.du.edu/documents/news/Ag-Gag-Complaint.pdf. For an account of the events that led to Amy Meyer's prosecution, authored by her co-plaintiff, *see* Will Potter, *First "Ag-Gag" Prosecution: Utah Woman Filmed a Slaughterhouse from the Public Street*, GREEN IS THE NEW RED (Apr. 29, 2013), http://www.greenisthenewred.com/blog/first-ag-gag-arrest-utah-amy-meyer/6948/.

57. Jim Dalrymple, *Utah prosecutor dismises suddenly high profile 'ag-gag' case,* SALT LAKE TRIBUNE (May 1, 2013, 7:39 AM), http://www.sltrib.com/sltrib/news/56240592-78/case-meyer-law-gag.html.csp.

58. *See supra* notes 41-45 and accompanying text.

59. *See* Civil Docket Report, Animal Legal Def. Fund v. Herbert, No. 2:13-cv-00679-RJS (D. Utah 2013). The additional plaintiffs include journalists, academics, People for the Ethical Treatment of Animals (PETA) and the Animal Legal Defense Fund (ALDF), among others. *Id.*

60. *ALDF Complaint*, *supra* note 56, at 34-39.

61. *Id.* at 37-39.

62. *Id.*

63. *Id.* at 37-38. *See also* Plaintiffs' Opposition to Defendants' Motion to Dismiss at 25-27, Animal Legal Def. Fund v. Herbert, No. 2:13-cv-00679-RJS (D. Utah Dec. 10, 2013) (No. 33), *available at* http://www.scribd.com/doc/190760493/Utah-Ag-Gag-Challenge-Plaintiffs-Opposition-to-the-Motion-to-Dismiss.

64. *See* Complaint, Animal Legal Def. Fund v. Otter, No. 1:14-cv-00104-BLW (D. Idaho Mar. 17, 2014), *available at* https://acluidaho.org/wpsite/wp-content/uploads/1.complaint1.pdf.

65. *Id.*

under the Food Safety Modernization Act ("FSMA") and the Clean Water Act ("CWA").[66] The district courts in Utah and Idaho are in separate federal circuits, meaning the Ninth and Tenth federal appeals circuits may be deciding the constitutionality of these similar ag-gag laws simultaneously.[67]

There is one indication that ag-gag laws could influence criminal prosecutions in states without such laws on their books. Colorado, a state without an ag-gag law, prosecuted an undercover reporter for animal cruelty in November 2013, when she turned over video footage of animal abuse that she filmed while working for Quanah Cattle Company from mid-July through September.[68] The reporter, Taylor Radig, was affiliated with the organization, Compassion Over Killing.[69] In her two months of employment, she filmed such substantial evidence of abuse that three employees were fired and charged with multiple counts of cruelty after Compassion over Killing published the footage.[70] The Weld County Sheriff's Office explained that Radig "may have been criminally negligent for failing to turn over the videotapes to law enforcement in a timely manner, under Colorado Revised Statutes 18-9-201 and 18-9-202."[71] Those statutes, however, reveal no express or implied timely reporting requirements.[72] Ultimately, the county dropped the charges against Radig,[73] but the prosecution clearly evoked the Category Four – Mandatory Disclosure approach, despite having no such law in Colorado.[74]

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66. *Id.* at ¶¶ 168-86. For a discussion of preemption under the Food Safety Modernization Act, *see infra* Part III.

67. *About U.S. Federal Courts*, FED. BAR ASSOC., http://www.fedbar.org/Public-Messaging/About-US-Federal-Courts_1.aspx (last vistited Mar. 5, 2014).

68. *See* Wayne Harrison, *Woman Who Took Cattle Abuse Video Charge with Animal Abuse*, 7NEWS DENVER (Nov. 23, 2013, 12:01 AM), http://www.thedenverchannel.com/news/local-news/woman-who-took-cattle-abuse-video-charged-with-animal-abuse.

69. *Id.*

70. *See* Matt Ferner, *Undercover Video Alleges Shocking Animal Abuse of Newborn Calves at Colorado Facility*, HUFFINGTON POST (Nov. 14, 2013, 2:03 PM), http://www.huffingtonpost.com/2013/11/14/video-newborn-calf-abuse_n_4275001.html (containing the video filmed by Radig and published by Compassion Over Killing); *see also* Alexis Croswell, *Charges Dropped Against Animal Rights Investigator Accused of Animal Cruelty*, ONE GREEN PLANET (Jan. 14, 2014), http://www.onegreenplanet.org/news/charges-dropped-against-animal-rights-investigator-accused-of-animal-cruelty/.

71. Croswell, *supra* note 70 and accompanying text.

72. *See* COLO. REV. STAT. §§ 18-9-201 to -202 (2014).

73. *Charges Dropped Against Woman Accused of Animal Cruelty*, CBS DENVER (Jan. 11, 2014), http://denver.cbslocal.com/2014/01/11/charges-dropped-against-woman-accused-of-animal-cruelty/.

74. There has been news, too, of a representative in Colorado intending to sponsor a Category Four - Mandatory Disclosure bill in Colorado that would make it a

E. Continuing Protectionist Legislative Agenda

In 2013-2014, numerous states proposed ag-gag bills—some with multiple proposals—that did not pass.[75] Most of the protectionist proposals in the states continue to involve one of the four ag-gag categories described above, especially Categories Three and Four, but a few discussed next are new and especially creative.

The Arkansas Senate put forward two ag-gag bills in 2013.[76] One would have criminalized conducting an animal investigation by anyone who was not a certified law enforcement officer.[77] This proposal did not fit into any ag-gag category listed above. Still, it would have criminalized citizen-reporting of incidents concerning farm animals.[78] The bill eventually passed but without the ag-gag portion included.[79]

The Indiana legislature contemplated three ag-gag bills in 2013, all of which were Category One - No Recording bills because they sought to

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misdemeanor to fail to report animal abuse within twenty-four hours. *See* Mary Roberts, *Soapbox: Let's Stop Making Telling the Truth a Crime*, COLORADOAN.COM (Jan. 30, 2014), http://www.coloradoan.com/article/20140130/OPINION04/301300080/.

75. *See Anti-Whistleblower Bills Hide Factory-Farming Abuses from the Public*, HUMANE SOC'Y OF THE U.S. (Mar. 25, 2014), http://www.humanesociety.org/issues/campaigns/factory_farming/fact-sheets/ag_gag.html#id=album-185&num=content-.

76. *See* S. 13, 89th Gen. Assemb., Reg. Sess. (Ark. 2013), *available at* http://www.arkleg.state.ar.us/assembly/2013/2013R/Acts/Act1160.pdf (Senate Bill 13 passed without the ag-gag provisions and was enacted as Act 1160); *Arkansas Senate Bill 13*, LEGISCAN (Apr. 12, 2013), https://legiscan.com/AR/bill/SB13/2013; S.14, 89th Gen. Assemb., Reg. Sess. (Ark. 2013), *available at* http://www.arkleg.state.ar.us/assembly/2013/2013R/SB14.pdf; *SB14 - Creating the Offense of Interference with a Livestock or Poultry Operation*, ARK. STATE LEG., http://www.arkleg.state.ar.us/assembly/2013/2013R/Pages/BillStatusHistory.aspx?measureno=SB14 (last visited Sept. 10, 2014).

77. *See* S. 13, 89th Gen. Assemb., Reg. Sess. (Ark. 2013), *available at* http://legiscan.com/AR/text/SB13/id/684193/Arkansas-2013-SB13-Draft.pdf (providing a proposed draft of Senate Bill 13). *See id.* at Sec. 3, § 5-62-128 (discussing the parameters of, and penalties for, conducting "improper animal investigations").

78. *Id.* at Sec. 3, § 5-62-128.

79. *See* S. 13, 89th Gen. Assemb., Reg. Sess. (Ark. 2013), *available at* http://www.arkleg.state.ar.us/assembly/2013/2013R/Acts/Act1160.pdf. The other Arkansas proposal targeted Category One – No Recordings and Category Three – No Lying offenses. *See* S. 14, 89th Gen. Assemb., Reg. Sess. (Ark. 2013), *available at* http://www.arkleg.state.ar.us/assembly/2013/2013R/Bills/SB14.pdf. This proposal died in May, 2013. *See SB14 - Creating the Offense of Interference with a Livestock or Poultry Operation*, ARK. STATE LEG., http://www.arkleg.state.ar.us/assembly/2013/2013R/Pages/BillStatusHistory.aspx?measureno=SB14 (last visited Sept. 11, 2014) (providing the legislative history of Senate Bill 14).

criminalize photographing or recording images at an agriculture facility.[80] One, however, would have further required the Indiana Board of Animal Health to register people convicted of crimes concerning an agricultural operation, much akin to a sex offender list.[81] Arguably, such a registry would further chill would-be undercover reporters or concerned employees from making recordings because the repercussions for being "listed" are unclear. None of the Indiana bills passed.[82]

Undeterred by those failures, Indiana's senate proposed an ag-gag law for the 2014 session that is both unique and nearly unbounded.[83] It would have amended the state's property crimes to allow agricultural operations to post a notice of "prohibited acts that may compromise the agricultural operation's trade secrets or operations."[84] The proposal would have also criminalized any violations of those private, farm-by-farm notices.[85] While this bill makes no mention of prohibited recordings, distribution of recordings, employment fraud, or mandatory disclosure requirements, it could fit all four ag-gag categories.[86] Indeed, it had the potential to be the most sweeping ag-gag bill yet because it would have vested agricultural operations with the power to create felonies themselves, which would raise serious due process concerns.[87] The only limit on what acts could be prohibited by notice (and thus enforced with a felony charge) is that prohibited acts had to be linked to "compromis[ing] the agricultural

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80. S. 373, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013), *available at* http://www.in.gov/legislative/bills/2013/IN/IN0373.1.html; S. 391, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013), *available at* http://www.in.gov/legislative/bills/2013/IN/IN0391.1.html; H.R. 1562, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013), *available at* http://www.in.gov/legislative/bills/2013/IN/IN1562.1.html.

81. *See* Ind. S. 391; *see also* Ind. H.R. 1562 (proposing an amendment to IND. CODE § 15-17-3-13 to add subsection (33), which requires the registry).

82. *See 2013 Indiana General Assembly Wrap-Up*, HOOSIER ENVTL. COUNCIL, Section IV.e, http://www.hecweb.org/billwatch2013/2013-legislative-session-in-review/ (last visited Sept. 12, 2014) (discussing the bills and their failure to pass).

83. *See Indiana Senate Bill 101*, OPENSTATES, http://openstates.org/in/bills/2014/SB101/#billtext (last visited Mar. 6, 2015) (providing information about Senate Bill 101).

84. S. 101, Sec. 2, § 35-43-1-9, 118th Gen. Assemb., 2d Reg. Sess. (Ind. 2014, as introduced), *available at* http://iga.in.gov/legislative/2014/bills/senate/101/#.

85. *Id.* Specifically, Senate Bill 101 decreed that any person "who knowingly or intentionally commits an act at an agricultural operation that is a prohibited act listed on a notice . . . commits a Level 6 felony." *Id.*

86. *See generally id.*

87. *See* U.S. CONST. amend. V. The potential due process problems with such an approach are beyond the scope of this analysis, but they are easy to anticipate when the particulars of a felony are on notice only in a private facility.

operation's trade secrets or operations."[88] Conceivably, an agricultural operation could have prohibited anyone entering the premises from communicating to anyone (ever) any information learned or instances observed at the facility. Such a prohibition could serve to protect the operation's trade secrets from being compromised. But it could also constitute the most suffocating ag-gag bill yet on the books. The protectionist language did not make it into subsequent versions of the bill.[89] The attempt, however, reflects the creativity of those promoting the agricultural legislative agenda and the lengths some lawmakers will go to protect agriculture interests.

Nebraska Legislative Bill 204 included Category Three - No Lying and Category Four - Mandatory Disclosure provisions.[90] The Nebraska Category Four proposal was both a carrot and a stick: failing to report suspected livestock abuse or neglect within twenty-four hours would be a class III misdemeanor;[91] but reporting within twenty-four hours would make the reporter "immune from liability except for false statements of fact made with malicious intent."[92] Potentially, if an undercover investigator had lied on a job application about an affiliation with an animal rights organization in order to gain employment so he could perform undercover reporting on the operation, that could be construed as such "malicious intent" that would strip away the Category Four immunity. If so, the Category Four - Mandatory Reporting requirement would impose self-incrimination of the Category

88. *See* Ind. S. 101, Sec. 2, § 35-43-1-9.

89. *See* S. 101, 118th Gen. Assemb., 2d Reg. Sess. (Ind. 2014, engrossed version), *available at* http://iga.in.gov/static-documents/c/8/1/9/c819f082/SB0101.04.COMH.pdf.

90. *See LB204 - Change and Provide Criminal Sanctions Regarding Animals and Animal Facilities*, NEB. LEG., http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=17956 (last visited Sept. 12, 2014) (providing the legislative history of Legislative Bill 204).

91. Legis. B. 204, 103rd Leg., 1st Sess., Sec. 2, §§ (3), (8) (Neb. 2013).

92. *Id.* at Sec. 4, § (4).

Three –No Lying crime.[93] Legislative Bill 204 did not pass in 2013[94] and was carried over into the 2014 term[95] when it finally failed.[96]

North Carolina's 2014 enactment may actually represent a new Category Five ag-gag law. North Carolina Senate Bill 648 created the criminal offense of "employment fraud."[97] Despite mimicking the ag-gag Category Three and Category Four scheme, this bill is not specific to agricultural facilities.[98] It criminalizes the act of gaining employment by giving false or incomplete application information when the purpose of gaining access to the place of employment is to create a photo, video, or audio recording within the facility.[99] It goes on to require that any recording made be turned over to local law enforcement within twenty-four hours.[100] There is no immunity for the reporting employee.[101] Accordingly, the relinquishment mandated by the law could trigger self-incrimination if employees turning over recordings effectively reveal their crimes of "employment fraud" committed in accessing the workplace. The bill died in 2013,[102] but was resurrected and passed in 2014.[103]

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93. If the immunity under Category Four is unavailable to the employee who intentionally lied on the job application, then the Category Four mandatory reporting would bring to light the very Category Three violation that strips the immunity. Accordingly, any combined Category Three and Category Four laws (without immunity for both under Category Four) could violate the constitutional right to remain silent. *See* U.S. CONST. amend. V.

94. *See LB204 - Change and Provide Criminal Sanctions Regarding Animals and Animal Facilities*, *supra* note 90.

95. *See State Carryover Procedures*, STATESIDE ASSOCS., http://www.stateside.com/wp-content/uploads/State-Carryover-Procedures-FactPad-Insert.pdf (last updated July 12, 2013) (noting that in Nebraska, bills introduced in the regular session of odd-numbered years are held over for consideration during the regular session in even-numbered years).

96. *See LB204 - Change and Provide Criminal Sanctions Regarding Animals and Animal Facilities*, *supra* note 90.

97. S. 648, Gen. Assemb., 2013 Sess. (N.C. 2013), *available at* http://www.ncleg.net/sessions/2013/bills/senate/PDF/s648v1.pdf. The bill would amend Article 19 of Chapter 14 of the North Carolina General Statutes by inserting the ag-gag bill, entitled "Employment Fraud," at N.C. GEN. STAT. § 14-105.1 (2013). *Id.*

98. *See generally id.*

99. *Id.* at Sec. 1, § 14-105.1(a)(1).

100. *Id.* at Sec. 1, § 14-105.1(c).

101. *See generally* N.C. S. 648, Sec 1.

102. *See Ag-Gag Laws*, SOURCEWATCH, http://www.sourcewatch.org/index.php/Ag-gag_laws#cite_note-34 (last visited Sept. 15, 2014) ("The bill was re-referred to the Senate committee on the Judiciary on May 7, 2013, and died without a vote when the legislative session ended July 26, 2013.").

103. *Senate Bill 648/S.L. 2014-110*, N.C. GEN. ASSEMB., http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=S648 (last visited Sept. 15, 2014).

This general employment bill has strong agricultural protectionist implications because North Carolina has a large number of concentrated animal feeding operations ("CAFOs"), especially for chicken and swine.[104] Thus, North Carolina's new law may reflect the next generation of efforts by legisltures in states with a strong agricultural economy to protect their ag industry while masking that effort in general across-the-board legislation.

F. Other Related Statutes and Torts

States that have not adopted food libel or ag-gag laws discussed above, still provide other forms of agriculture protection.[105] For example, more than half the states have laws that heighten penalties for fraud, property damage and/or trespass when it involves an animal or agricultural facility to help deter crimes against agribusiness.[106] Additionally, at least eight states have enacted animal terrorism statutes.[107] Like the ag-gag statutes discussed above, these laws tend to target the activities of animal rights activists. Their aim, however, is to protect property rather than to stifle reports of unsafe or inhumane food production practices.[108] Thus, the laws do not impact the free speech of whistleblowers and suppress discussion of food safety concerns directly the way ag-gag laws do.

Finally, states already have torts and crimes that have been used to challenge the kinds of behavior ag-gag laws target. Ag-gag proponents

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104. DANIEL IMHOFF, *Introduction to* CAFO: THE TRAGEDY OF INDUSTRIAL ANIMAL FACTORIES xvi (Daniel Imhoff ed., 2010).

105. *See, e.g.*, S.C. CODE ANN. §§ 47-21-10 to -260 (2012), *available at* http://www.scstatehouse.gov/query.php?search=DOC&searchtext=47%209%20710&category=CODEOFLAWS&conid=7309575&result_pos=0&keyval=979&numrows=10 (containing no ag-gag provision). States with the ag-gag law categories discussed above tend to include them along side or within statutes that heighten penalties for injuries done to agricultural facilities. *See, e.g.*, KAN. STAT. ANN. § 47-1827(c) (2013) (containing an ag-gag provision).

106. Bollard, *supra* note 17, at 10961.

107. *See* Landfried, *supra* note 17, at 379 n.11, 393 n.87.

108. *Id.* at 393. The federal Animal Enterprise Interference Act, 18 U.S.C. § 43 (2012), and its predecessor, the Animal Enterprise Protection Act (AEPA), 18 U.S.C. § 43 (1992), also protect farms and other animal operations from interference by animal rights activists and others. The original federal version was limited to property damage that caused a "physical disruption" of animal enterprise activity, 18 U.S.C. § 43(a) (1992), akin to the state animal terrorism laws that target vandalism and other property damage. The new federal version covers behavior that damages or interferes with the animal enterprise, rather than physically disrupts it. 18 U.S.C. § 43(a) (2012). The act also includes conduct involving threats, not just property damage. 18 U.S.C. § 43(a)(2)(B) (2012). Since this present analysis is focused on state protectionist activities, it will not analyze this federal protection in further detail.

"have stressed that the underlying goal of the laws is to prevent animal-rights activists from infiltrating facilities to capture footage that they will then present in a manner that is untruthful and harmful to the farming industry."[109] Agricultural facilities already have recourse against that kind of behavior in actions for defamation, breach of loyalty, willful misrepresentation, tortious interference, intrusion, and unfair trade practices. Indeed, reporters have been found liable under those legal theories in the performance of their reporting.[110] Accordingly, ag-gag laws criminalize behavior that is already illegal or actionable[111] and move the bulk of enforcement from torts to crimes or hybrid crime-torts, shifting at least some of the cost of enforcement from alleged victims to all taxpayers.[112] This shift confirms that lawmakers in these states are willing to provide protection for agriculture that other economic sectors do not enjoy.

Ag-gag laws are especially incongruous when understood in relation to the current food safety approach embodied in federal law. This food system and its reliance on self-reporting by food workers is discussed next.

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109. Adam, *supra* note 17, at 1173; *see also* Sara Lacy, Comment, *Hard to Watch: How Ag-Gag Laws Demonstrate the Need for Federal Meat and Poultry Industry Whistleblower Protections*, 65 ADMIN. L. REV. 127, 144 (2013).

110. *See* Landfried, *supra* note 17, at 384 nn.33-36; *see also* Adam, *supra* note 17, at 1175; Kingery, *supra* note 17, at 664-67; John K. Edwards, *Should There Be Journalist's Privilege Against Newsgathering Liability?*, 18 COMM. LAW. 8, 10 (2000).

111. *But see* Bollard, *supra* note 17, at 10970 ("Only two tort suits appear to have arisen from animal rights undercover investigations. In both cases, the courts applied reasoning similar to the *Desnick* and *Food Lion* courts' reasoning and dismissed all of the charges brought. The courts' dismissal of these claims suggests why Iowa and Utah lawmakers saw a need for the Ag-Gag laws."). This history Bollard describes is similar to the course of events that spawned statutory food libel protection in the 1990s. *See supra* notes 11-14 and accompanying text.

112. As acknowledged by other commentators, "criminal law . . . has the unique ability to assign blame and censure with a moral force that the civil law cannot. It effectively sends the message that it is prohibiting behavior which lacks *any* social utility. . . . Crime is also seen as a moral fault and carries with it the weight of shame and stigma that the commission of a tort simply does not." Bryan H. Druzin & Jessica Li, *The Criminalization of Lying: Under What Circumstances, If Any, Should Lies Be Made Criminal?*, 101 J. CRIM. L. & CRIMINOLOGY 529, 571-72 (2011). Given the public utility of previous undercover reports on the food industry, it is hard to see how whistleblowing merits criminal sanction.

III. FOOD SAFETY SYSTEM

The United States Department of Agriculture ("USDA") regulates the production of meat, poultry, and eggs.[113] The debate about protectionism embodied in state ag-gag laws has focused on food products governed by the USDA because surreptitious videos that spawned those laws usually involved beef, pork or poultry production facilities.[114] Nevertheless, mass production and distribution of fresh fruits and vegetables are a major source of food safety concerns,[115] and most of the recently passed ag-gag laws apply to both animal and crop farms.[116] Fruits, nuts, dairy, seafood, and vegetables are within the scope of Food and Drug Administration ("FDA").[117] In 2011, the Food Safety Modernization Act ("FSMA")[118] amended the FDA's authority to regulate food safety.[119] The FSMA, however, specifically states that nothing in it shall limit the authority of the Secretary of Agriculture[120] under the Federal Meat Inspection Act,[121] the Poultry Products Inspection Act,[122] or the Egg Products Inspection Act.[123]

The competing USDA and FDA food safety systems, including whistleblower protection (or lack thereof) in each scheme, are discussed next.

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113. The Food Safety and Inspection Service ("FSIS") is the primary body within the USDA that carries out food safety authority under multiple enabling statutes. *See generally About FSIS*, USDA—FOOD SAFETY & INSPECTION SERVICE, http://www.fsis.usda.gov/wps/portal/informational/aboutfsis (last modified Oct. 1, 2014).

114. *See, e.g.*, Brown, *supra* note 5.

115. *See generally* Rita Marie Cain, *Salads, Safety and Speech Under a National Leafy Greens Marketing Agreement*, 67 FOOD & DRUG L.J. 311 (2012).

116. *See generally supra* Part II.

117. The Federal Food, Drug, and Cosmetic Act (FFDCA) established the Food and Drug Administration (FDA) in 1938. Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified in scattered sections of 21 U.S.C.).

118. Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885, 3947 (2011) (codified in scattered sections of 21 U.S.C.). The FDA is an agency within the Department of Health and Human Services ("HHS"). Accordingly, all the mandates in FSMA are directed at the HHS Secretary. *FDA Organization*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/AboutFDA/CentersOffices/ (last updated Feb. 25, 2015).

119. 21 U.S.C. § 350j (2006 & Supp. IV 2011).

120. 21 U.S.C. § 2251(4) (Supp. IV 2011).

121. *Id.* at (A).

122. *Id.* at (B).

123. *Id.* at (C).

A. USDA Safety Approach

Of the numerous USDA divisions that share some responsibility for food safety,[124] FSIS has been characterized as the most important.[125] FSIS executes the USDA's statutory mandate to examine animals used in commerce, both before and after slaughter.[126] To carry out its authority, FSIS inspectors are expected to have complete, unfettered access to both food processing plants and their products.[127] Inspectors can order any animal or carcass to be removed if unfit for human consumption.[128] Failure to comply can result in an inspector revoking the facility's inspection privileges, effectively shutting the operation down.[129]

Historically, inspection was done using sight, touch, and smell to detect livestock disease or food contamination.[130] Inspectors may detect contamination visually, and require facilities to rectify fecal matter (a carrier for the microbes and pathogens in food) on animals and carcasses.[131] But external inspections are inadequate to address microbial infestations, such as E-coli.[132] Accordingly, the USDA implemented a significant overhaul in its

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124. For example, its Veterinary Services provide surveillance of animal, poultry, and aquaculture health. *Animal Health*, USDA—ANIMAL & PLANT HEALTH INSPECTION SERV., http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/animalhealth (last visited Sept. 22, 2014) (follow "Monitoring and Surveillance" hyperlink, on left; then "National Animal Health Surveillance System (NAHSS)," on right).

125. Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61, 99 (2000).

126. Federal Meat Inspection Act, 21 U.S.C. §§ 602, 603 (2014); Poultry Products Inspection Act, 21 U.S.C. §§ 452, 455 (2014).

127. 9 C.F.R. § 300.6(b) (2004). Eileen Starbranch Pape, Comment, *A Flawed Inspection System: Improvements to Current USDA Inspection Practices Needed to Ensure Safer Beef Products*, 48 HOUS. L. REV. 421, 432 (2011).

128. 9 C.F.R. § 311.1 (1970).

129. 9 C.F.R. §§ 302.1-302.3 (1971) (requiring inspection at ***every*** non-exempt establishment, and of ***all*** livestock and products entering a non-exempt establishment and ***all*** products prepared at a non-exempt establishment (emphasis added)). The pervasive nature of this inspection mandate leads to the conclusion that a USDA decision to withdraw inspectors has the effect of suspending operations. *See* Katherine A. Straw, Note, *Ground Beef Inspections and E. Coli O157:H7: Placing the Needs of the American Beef Industry Above Concerns for the Public Safety*, 37 WASH. U. J.L. & POL'Y 355, 359 (2011); *see also* Pape, *supra* note 127, at 443-44.

130. *See* Pape, *supra* note 127, at 434.

131. *See generally* Cain, *supra* note 115. Slaughterhouses are allowed to use organic acid sprays to wash away fecal matter. FSIS randomly tests ground beef for E-coli, as do producers, voluntarily. *See* Pape, *supra* note 127, at 433-34.

132. *See* Straw, *supra* note 129 (discussing the intricasies of E-coli infestation).

inspection regiment to a Hazard Analysis Critical Control Point ("HACCP")[133] system.

HACCP is a "systematic approach to the identification, evaluation, and control of food safety hazards."[134] HACCP has been characterized as "management-based regulation"[135] in which producers self-identify potential risks throughout food processing and establish minimal values at which the risks can be controlled or eliminated at critical control points.[136] Instead of FSIS inspectors looking for contamination and removing the defective product, "HACCP takes a preventative approach by requiring the placement of controls on conditions that pose threats to contamination throughout the process."[137] The FSIS inspector now only evaluates the plan and inspects the documentation generated at the critical points, not the food.[138] Food safety tasks at critical control points have shifted from FSIS inspectors to the facilities' own employees.[139]

In such a system, transparency and accountability within the food producing operation are critical to safety.[140] If reporting on the procedures in the plan is based on anything less than full disclosure, the resulting FSIS approval will be based on flawed assumptions. When protectionist laws hamper whistleblowers or investigative reporters, the HACCP process is undermined. As such, state protectionist statutes that stifle whistleblowing and investigative reporting are antithetical to the current USDA safety scheme.

Shortcomings in USDA's current HACCP system[141] have led to proposed changes. One such revision, the Safe Meat and Poultry Act of

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133. *See generally* Hazard Analysis and Critical Control Point (HACCP) Systems, 21 C.F.R. §§ 120.1-.25 (2001).

134. NAT'L ADVISORY COMM. ON MICROBIOLOGICAL CRITERIA FOR FOODS, *HACCP Principles and Application Guidelines*, U.S. FOOD & DRUG ADMIN. (Aug. 14, 1997), http://www.fda.gov/Food/GuidanceRegulation/HACCP/ucm2006801.htm.

135. Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC'Y REV. 691, 696-98 (2003).

136. Lauren Gwin & Arion Thiboumery, *Local Meat Processing: Business Strategies and Policy Angles*, 37 VT. L. REV. 987, 1001 (2013); Eva Merian Spahn, *Keep Away from Mouth: How the American System of Food Regulation Is Killing Us*, 65 U. MIAMI L. REV. 669, 710-11 (2011).

137. Pape, *supra* note 127, at 438.

138. *Id.*

139. *Id.* at 439.

140. *Id. See also* Straw, *supra* note 129, at 364-66.

141. Joby Warrick, *An Outbreak Waiting to Happen: Beef-Inspection Failures Let In a Deadly Microbe*, WASH. POST, Apr. 9, 2001, at A1, http://www.cyberclass.net/outbreak.htm. *See also* James S. Cooper, Note and Comment, *Slaughterhouse Rules: How Ag-Gag Laws Erode the Constitution*, 32 TEMP. J. SCI. TECH.

2013, not only specifies new requirements for safe meat handling, but also includes protection for whistleblowers.[142] The bill would protect employees who are "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against" for providing information to a supervisor or government agency about an act that the person reasonably believes constitutes a violation of food safety laws, rules or regulations, or that constitutes a threat to the public health.[143] The bill is still pending.[144]

B. FDA Food Safety Under the FSMA

Under its original enabling legislation, the FDA exercised its food safety authority by supporting industry self-regulation and investigating safety problems after the fact.[145] For example, in 2006, an E. coli outbreak resulted in 205 confirmed illnesses and three deaths across twenty-six states.[146] Afterward, the FDA and others[147] traced the outbreak to Dole brand spinach and contamination from one field in California.[148]

At that time, the FDA's quality-control guidelines for fresh produce addressed concerns that could potentially expose produce to pathogens: water sources, manure, field sanitation, worker hygiene, facilities sanitation, and transportation.[149] The International Fresh Produce Association

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& ENVTL. L. 233, 238-40 (2014); Larissa Wilson, Comment, *Ag-Gag Laws: A Shift in the Wrong Direction for Animal Welfare on Farms,* 44 GOLDEN GATE U.L. REV. 311, 326-28 (2014).

142. S. 1502, 113th Cong. § 270 (2013), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-113s1502is/pdf/BILLS-113s1502is.pdf.

143. *Id.*

144. Travis Korte, *Safe Meat and Poultry Act of 2013,*CTR. FOR DATA INNOVATION (Feb. 28, 2014), http://www.datainnovation.org/2014/02/safe-meat-and-poultry-act-of-2013/.

145. *See generally Significant Dates in U.S. Food & Drug Law History*, U.S FOOD & DRUG ADMIN., http://www.fda.gov/AboutFDA/WhatWeDo/History/Milestones/ucm12835.htm (last updated Dec. 19, 2014) (providing a historical timeline of FDA enabling legislation).

146. *FDA Finalizes Report on 2006 Spinach Outbreak*, U.S. FOOD & DRUG ADMIN. (Mar. 23, 2007), http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2007/ucm108873.htm; *How FDA Works to Keep Produce Safe*, DRUGS.COM (Mar. 1, 2007), http://www.drugs.com/fda-consumer/how-fda-works-to-keep-produce-safe-66.html.

147. *How FDA Works to Keep Produce Safe*, *supra* note 146.

148. The investigation was one of the first to trace a food poisoning outbreak to its source. Denis W. Stearns, *On (Cr)edibility: Why Food in the United States May Never be Safe*, 21 STAN. L. & POL'Y REV. 245, 274 (2010).

149. FOOD SAFETY INITIATIVE STAFF, CTR. FOR FOOD SAFETY & APPLIED NUTRITION, GUIDE TO MINIMIZE MICROBIAL FOOD SAFETY HAZARDS FOR FRESH FRUITS AND VEGETABLES 39 (1998), *available at*

developed these safety guidelines in 1998.[150] Thus, the FDA guided industry regarding safety practices, using industries' own self-regulatory standards. The government agency lacked all authority to mandate its own preventative safety measures prior to 2011.[151]

In the face of increasing food contamination incidents,[152] however, the 2011 FSMA created several new duties and powers in the FDA.[153] For the first time, the FDA is required to mandate comprehensive safety standards for production and handling of raw fruits and vegetables.[154] Further, under FSMA, the FDA will partner with the USDA and officials in states and localities, to coordinate food safety programs.[155] Thus, the statute expressly recognizes the importance of a state and local safety net to protect national food safety interests. State protectionist legislation that stifles open dialogue about safety concerns seems antithetical to this FSMA safety scheme. Additionally, under FSMA, food importers have the primary role in verifying the safety of the imported food from foreign suppliers.[156] Such a system gives private parties an important role in self-governance of the food safety system.[157] Again, state protectionism that strips private parties of their ability to monitor these food importers seems counter-intuitive to safety.

The importance of employee reporting of safety violations is reflected in the FSMA's express whistleblower protection scheme. If an employee reports a potential statutory violation, testifies about it, or refuses to participate in it

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http://www.fda.gov/downloads/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/ProduceandPlanProducts/UCM169112.pdf.

150. Matthew Kohnke, Note, *Reeling in a Rogue Industry: Lethal E. Coli in California's Leafy Green Produce & the Regulatory Response*,12 DRAKE J. AGRIC. L. 493, 502-03 (2007).

151. There is no such enabling legislation to be found prior to 2011.

152. In June, 2011, Dole Fresh Vegetables, Inc. of Monterey, California, voluntarily recalled over two thousand cases of "Italian Blend" salad bags in twelve U.S. states and Canada after random sampling by the Ohio Department of Agriculture found the bacteria listeria. *Dole Recalls Thousands of Bags of Salad Greens*, FOOD SAFETY NEWS (June 24, 2011), http://www.foodsafetynews.com/2011/06/dole-recalls-thousands-of-bags-of-salad/. Listeria was the pathogen found on cantaloupes from one large Colorado facility in the fall of 2011 that caused thirty-three deaths and 147 confirmed cases of listeriosis across twenty-eight states. *Multistate Outbreak of Listeriosis Linked to Whole Cantaloupes from Jensen Farms, Colorado*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 28, 2011), http://www.cdc.gov/listeria/outbreaks/cantaloupes-jensen-farms/index.html.

153. *FDA Food Safety Modernization Act (FSMA)*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/Food/GuidanceRegulation/FSMA/ (last updated Mar. 5, 2015).

154. 21 U.S.C. § 350h(a)(1)(A) (Supp. IV 2011).

155. *Id.* at § 399c(b)-(d) (Supp. IV 2011).

156. *Id.* at § 384a(a)(1) (2013).

157. *See generally* Tacy Katherine Hass, *New Governance: Can User-Promulgated Certification Schemes Provide Safer, Higher Quality Food?*, 68 FOOD & DRUG L.J. 77, 86 (2013).

on the job,[158] the FSMA prohibits any covered employer from firing or otherwise discriminating against that whistleblower "with respect to compensation, terms, conditions, or privileges of employment."[159] This FSMA whistleblower protection, however, does not expressly preempt a food producer under FDA jurisdiction from pursuing legal recourse outside of employment rights or benefits, such as a civil food libel claim, or a criminal charge under state ag-gag laws.[160] The dynamic between federal food safety policy and agricultural protectionism is discussed next.

IV. PROTECTIONISM OR PREEMPTION? UNCERTAIN FEDERAL POLICY

State protectionist legislation that suppresses negative information coming out of farms would seem to directly contravene the federal food safety schemes discussed above that are built around management-based regulation and self-reporting by food producers. Nevertheless, one commentator analyzed the whistleblower protection in FSMA to conclude that it does not expressly or impliedly preempt retaliatory civil food libel claims against food safety whistleblowers.[161] Since that time, OSHA has enacted regulations to implement FSMA whistleblower protections[162] that are considered broad in their scope.[163] Still, the conclusion that the FSMA does not preempt these state efforts at agricultural protectionism seems even stronger when applied to newer state ag-gag laws. Category One through Four ag-gag protections all establish criminal violations. FSMA prohibits retaliatory discharge or other adverse employment actions by food-producing employers against their employees.[164] These whistleblower protections clearly do not reach state prosecutors who pursue criminal charges against whistleblowers. The same conclusion would apply to any ag-gag prosecution in the face of the proposed USDA whistleblower provisions in the 2013 Safe Meat and Poultry Act.[165]

At best, then, federal preemption can only be a defense in an ag-gag prosecution, namely that federal food safety law impliedly preempts any

158. 21 U.S.C. § 399d(a)(1)-(4) (Supp. IV 2011).
159. *Id.* at § 399d(a).
160. *Id.*
161. *See* Cain, *supra* note 12, at 306-07.
162. 29 C.F.R. § 1987 (2014).
163. Earl "Chip" Jones III, Linda Jackson & Jill Weimer, *OSHA Issues New Rule for Food Safety Whistleblowers*, LITTLER (Feb. 21, 2014), http://www.littler.com/publication-press/publication/osha-issues-new-rule-food-safety-whistleblowers.
164. Cain, *supra* note 12, at 306-307.
165. *See* Safe Meat and Poultry Act, *supra* note 142.

state protectionism that shields food safety violators from scrutiny.[166] As was noted above, secrecy is contraindicated under HACCP, which is now the safety approach of both USDA and FDA.[167] Nevertheless, a successful defense of implied preemption based on a general need for openness in the food safety systems seems unlikely in a state ag-gag prosecution.[168] This defense would have working against it, the presumption against federal preemption.[169]

Recently, in *Nat'l Meat Ass'n v. Harris*,[170] the Supreme Court concluded the USDA's slaughterhouse and packing plant regulations under the Federal Meat Inspection Act ("FMIA") preempted California's stricter standards for handling disabled livestock.[171] The scope of the FMIA preemption, although broad according to the Court, clearly focuses on state laws that impose requirements on meat production operations at Food Safety and Inspection Service ("FSIS") inspected facilities.[172] State protectionist laws discussed herein impose no such requirements. Accordingly, nothing in the preemption language applied in *Harris* would seem to apply to state protectionist laws that stifle whistleblowers.

Further highlighting the apparent weakness of current federal law to preempt state agricultural protectionism, federal lawmakers recently attempted to add ***express federal protectionism*** in the federal farm bill.[173]

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166. Alternatively, the United States could challenge the state criminal laws like it successfully did against Arizona's immigration reform laws. *See* United States v. Arizona, 132 S. Ct. 2492 (2012). In the *Arizona* case, however, the government was protecting federal immigration authority, which expressly preempts state immigration laws. *See* U.S. CONST. art. I, § 8, cl. 4. *See also* 8 U.S.C. § 1324a(h)(2) (2012). Such express statutory basis for challenging ag-gag laws neither applies under FSMA nor is proposed under USDA revisions.

167. *See supra* text accompanying notes 133-40.

168. Plaintiffs in the Idaho ag-gag civil litigation asserted preemption under FSMA. *See* Complaint, *supra* note 64, ¶¶ 177-180.

169. *See* Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 446 (1960) (cited by the Court in United States v. Arizona, 132 S. Ct. at 2509-10, supporting the Court's declination to preempt one provision of the Arizona law on checking the status of arrestees until the law had been in effect, enforced, and interpreted by the state courts). Recently, a Tennessee court rejected a preemption defense in a state improper-labeling crime based on federal copyright law. *See* State v. Pierson, No. W2012-02565-CCA-R3-CD, 2014 WL 261414 (Tenn. Crim. App. Jan. 23, 2014). This criminal preemption defense was unsuccessful even in the face of express preemption in federal copyright law. *See* 17 U.S.C § 301(a) (2013) (unavailable for ag-gag defendants under FSMA).

170. Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965 (2012).

171. *Id.*

172. *Id.* at 966 (quoting 21 U.S.C. § 678 (2014)).

173. Agriculture Reform, Food, and Jobs Act of 2013, S. 954, 113th Cong. (2013) (emphasis added).

The farm bill is omnibus legislation[174] passed once every five to seven years that sets the country's agricultural and food security agenda.[175] The latest version became law February 7, 2014.[176] One provision that did not make it into the final law nevertheless is instructive on current federal and state tensions regarding agriculture policy, for instance the Protection of Interstate Commerce Act ("PICA"), not a standalone act but a section of H.R. 2642,[177] would have arguably preempted all state agriculture laws that require tougher safety or animal treatment standards than ones set by federal law.[178] Arguably, PICA represented an unprecedented attempt to extend the Commerce Power into areas traditionally controlled by states.[179] The National Conference of State Legislatures opposed the measure, calling it a violation of the Tenth Amendment that would hinder states' abilities to "protect their citizens from invasive pests and livestock diseases, maintain quality standards for all agricultural products and ensure food safety."[180]

The impetus for PICA was California's Proposition 2.[181] Passed by voters in 2008, this law requires that cages for veal calves, pregnant sows, and egg-laying hens be large enough for the animals to lie down, stand up, fully extend their limbs and turn around freely.[182] In the wake of this successful voter initiative, California legislators passed a 2009 law banning the in-state sale of any eggs not produced under conditions required by the

174. The bill tends to span hundreds of pages because so many issues are addressed. For example, the Senate's proposed 2013 farm bill, Agriculture Reform, Food, and Jobs Act of 2013, S. 954, 113th Cong. (2013), spans 1163 pages. *See* GOVTRACK.US, https://www.govtrack.us/congress/bills/113/s954 (last visited Sept. 22, 2014).

175. *See generally* DANIEL IMHOFF, FOOD FIGHT: THE CITIZEN'S GUIDE TO THE NEXT FOOD AND FARM BILL 24 (Watershed Media, 2d ed. 2012).

176. David Jackson, *Obama Signs Farm Bill*, USA TODAY (Feb. 7, 2014, 4:23 PM), http://www.usatoday.com/story/news/politics/2014/02/07/obama-farm-bill-signing-lansing-michigan/5282827/. In signing the bill, the President compared it to a Swiss Army knife because it does so many things. *Id.*

177. The Agricultural Act of 2014, H.R. 2642, 113th Cong. (2013).

178. *Id.*; *see also* Lydia O'Conner, *Legal Experts Slam Controversial Farm Bill Amendment In Letter To Congress*, HUFFINGTON POST (Jan. 25, 2014, 4:01 PM), http://www.huffingtonpost.com/2013/12/06/law-professors-farm-bill_n_4401489.html.

179. *See* O'Connor, *supra* note 178. *See also* Pamela Vesilind, *Preempting Humanity: Why National Meat Ass'n v. Harris Answered the Wrong Question*, 65 ME. L. REV. 685, 692-702 (2013).

180. Melanie Condon, *NCSL Stakes Out Farm Bill Position in Letter to House, Senate Conference Leaders*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 22, 2013), http://www.ncsl.org/blog/2013/11/22/ncsl-stakes-out-farm-bill-position-in-letter-to-house-senate-conference-leaders.aspx.

181. CAL. HEALTH & SAFETY CODE §§ 25990-94 (effective Jan. 1, 2015).

182. *Id.*

California cage law.[183] In other words, the California market is now closed to all egg sellers who do not comply with California's cage mandate. This helps California egg producers to compete on price with out-of-state egg suppliers who are not constrained by mandates like Proposition 2. PICA's sponsor, Steve King, represents Iowa, the largest egg producing state in the U.S.[184]

Although PICA did not make it into the 2014 farm bill,[185] vestiges of it continue to percolate around the California egg law. The attorney general of Missouri initiated an action against the California law, alleging that it violates the rights of egg producers outside California to sell their eggs in interstate commerce.[186] Subsequently, officials representing Iowa, Nebraska, Kentucky, Oklahoma, and Alabama joined the suit.[187] Thus, proponents of agricultural protectionism now are moving from the statehouse to the courthouse to attack food safety and animal rights initiatives.[188]

For federal food safety policy to trump state agricultural protectionism, express federal preemption will be needed.[189] For now, however, a defense against state ag-gag laws under the First Amendment free speech right could be a stronger challenge to state agriculture protectionism, as is discussed next.

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183. Treatment of Animals – Shelled Eggs – Sale for Human Consumption Act, ch. 51, A.B. No. 1437, 2010 Cal. Stat. 430.

184. *See* Martin, *supra* note 38. *See also Charts and Maps: Annual Egg Production by States*, NAT'L AGRIC. STATISTICS SERV. (Apr. 29, 2014), http://www.nass.usda.gov/Charts_and_Maps/Poultry/eggmap.asp.

185. NCSL, *The Agricultural Act of 2014*, http://www.ncsl.org/documents/standcomm/scrni/2014_fullfarmbillanalysis.pdf (last visited Mar. 24, 2014) (explaining that the King Amendment was not included in the 2014 farm bill).

186. Mike McGraw, *Missouri Enlists in the Egg Wars*, KANSAS CITY STAR (Feb. 1, 2014, 5:31 PM), http://www.kansascity.com/2014/02/01/4792128/missouri-enlists-in-the-egg-wars.html.

187. Jacob Bunge & Jesse Newman, *States Join Suit to Block California Egg Law*, WALL ST. J. (Mar. 6, 2014, 2:51 PM), http://blogs.wsj.com/law/2014/03/06/states-join-suit-to-block-california-egg-law/?mg=blogs-wsj&url=http%253A%252F%252Fblogs.wsj.com%252Flaw%252F2014%252F03%252F06%252Fstates-join-suit-to-block-california-egg-law.

188. The California voter initiative has survived several legal challenges. *See* Kathleen Masterson, *Court Upholds California's Law on Chicken Cage Sizes*, CAPITAL PUB. RADIO (Sept. 13, 2012), http://archive2.capradio.org/articles/2012/09/13/court-upholds-california's-law-on-chicken-cage-sizes.

189. *See* Cain, *supra* note 12, at 317-18. A federal bill, the Egg Products Inspection Act Amendments of 2013, would gradually phase in national cage requirements similar to California's for egg-laying chickens. H.R. 1731, 113th Cong. (1st Sess. 2013), *available at* https://www.govtrack.us/congress/bills/113/hr1731.

V. FIRST AMENDMENT ISSUES IN AGRICULTURAL PROTECTIONISM

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech, or of the press."[190] State governments are bound by the First Amendment under the Fourteenth Amendment.[191] Agriculture protectionist measures have received some First Amendment analysis. The free speech issues inherent in early food libel laws have been discussed at length and are not repeated here.[192] Similarly, several student authors have analyzed ag-gag laws through the lens of the First Amendment.[193] In those analyses, the authors apply several traditional free speech approaches such as Content-Based Restrictions,[194] Prior Restraints[195] and Expressive Conduct.[196] They differ in the degree of scrutiny they believe applies to the laws and they differ in some of their conclusions.[197] This is not surprising. As distinguished constitutional scholar, Erwin Chemerinsky, noted, there are many First Amendment doctrines, yet "no prescribed order for analysis."[198]

One consistency is reflected in the literature: Categories One and Two (No Recording and No Distributing) have received the bulk of the attention, while Category Three - No Lying and Category Four - Mandatory Disclosure have received scant analysis.[199] This Part explains free speech issues not previously scrutinized relative to Category Three – No Lying laws

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190. U.S. CONST. amend. I.

191. *See, e.g.*, NAACP v. Alabama, 357 U.S. 449, 460 (1958).

192. *See supra* note 13 and accompanying text.

193. *See* Landfried, *supra* note 17; Bollard, *supra* note 17; Adam, *supra* note 17; Kingery, *supra* note 17. *See also* Cooper, *supra* note 141.

194. *See* Landfried, *supra* note 17, at 388-89; Adam, *supra* note 17, at 1169-70; Kingery, *supra* note 17, at 670-71.

195. *See* Landfried, *supra* note 17, at 389; Adam, *supra* note 17, at 1171-72; Kingery, *supra* note 17, at 669-70.

196. *See* Bollard, *supra* note 17, at 10974-75; Adam, *supra* note 17, at 1133-37; Kingery, *supra* note 17, at 667-69. Landfried also discusses Incidental Restraints and Overbreadth, *supra* note 17, at 380-81, while Bollard opines on underinclusion, *supra* note 17, at 10975-77.

197. *See generally* Landfried, *supra* note 17; Adam, *supra* note 17; Kingery, *supra* note 17; Bollard, *supra* note 17.

198. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 960 (Wolters Kluwer Law & Bus. 4th ed. 2011). "Simply put, it is not possible to comprehensively flowchart the First Amendment as a defined series of questions in a required sequential order." *Id.*

199. Bollard, *supra* note 17, at 10977; Landfried, *supra* note 17, at 389. *See also,* Larissa U. Leibmann, *Fraud and First Amendment Protections of False Speech: How United States v. Alvarez Impacts Constitutional Challenges to Ag-Gag Laws*, 31 PACE ENVTL. L. REV. 566, 589 (2014).

and compelled relinquishment or reporting under Category Four – Mandatory Disclosure.

A. The Constitutional "Right to Lie"

In 1974, the U.S. Supreme Court stated "there is no constitutional value in false statements of fact."[200] Other statements by the Court before and after *Gertz* suggested that the First Amendment free speech right did not protect lying.[201] Nevertheless, in 2012, the Court held that the First Amendment protects some intentional lies.[202] This Part explains the *Alvarez* opinions to conclude that the Idaho, Iowa and Utah Category Three – No Lying laws may well violate this recently-articulated free speech protection.

While publicly introducing himself as a newly elected member of the water district board for Pomona, California, Xavier Alvarez falsely claimed to have received the Medal of Honor.[203] He was convicted under the federal Stolen Valor Act, which criminalized falsely stating one had received a military decoration or medal.[204] The motive for Alvarez's lie did not appear to be any political or material benefit.[205] As discussed herein, the fact that Alvarez did not lie to secure employment does not sufficiently distinguish his protected lie from those of undercover activists who lie to get farm jobs.

In a 6-3 result, a plurality struck down the Act.[206] Justice Kennedy wrote an opinion that was joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor.[207] Justice Breyer concurred in the result, along with Justice Kagan.[208] Justice Alito was joined by Justices Scalia and

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200. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

201. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

202. *See* United States v. Alvarez, 132 S. Ct. 2537 (2012).

203. Dahlia Lithwick, *Heavy Medals: Sotomayor's Boyfriends Lie to Her? And the Other Untruths that Worry the Supreme Court*, SLATE.COM (Feb. 22, 2012, 8:13 PM), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2012/02/xavier_alvarez_lied_about_winning_the_congressional_medal_of_honor_.html. The Stolen Valor Act enhanced penalties for those who falsely claimed receipt of the Congressional Medal of Honor. 18 U.S.C. § 704(c) (2014).

204. 18 U.S.C. § 704(b) (2014).

205. *Alvarez*,132 S. Ct. at 2542.

206. *Id.* at 2537.

207. *Id.*

208. *See id.* at 2551-56.

Thomas in dissent.[209] All three opinions are instructive that Category Three – No Lying laws will not withstand constitutional scrutiny.[210]

Justice Kennedy's opinion rejects an analysis of past precedents that "all proscriptions of false statements are exempt from exacting First Amendment scrutiny."[211] He then goes on to distinguish the Stolen Valor Act from three examples of false speech crimes that have been upheld: lying to a government official, perjury, and falsely representing oneself as a government official.[212] The government has a compelling interest that requires punishing each of these lies, even in the face of rigorous free speech defense.[213] By contrast, the lies targeted by the Stolen Valor Act are ones "simply intended to puff up oneself."[214]

Having established that free speech precedents do not require truthfulness as the basis for First Amendment protection, the opinion zeroes in on speech prohibited by the Stolen Valor Act. Justice Kennedy decries the notion of an unlimited governmental power "to compile a list of subjects about which false statements are punishable."[215] Equating such an environment to George Orwell's *1984*, he warned that if the Stolen Valor Act were sustained, "there could be an endless list of subjects the National Government or the States could single out."[216]

Arguably, the Category Three – No Lying laws are exactly such an unconstitutional list. Or not. Justice Kennedy quickly articulates one "limiting principle" that could allow states to criminalize lying to get a farm job: "Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First

209. *Id.* at 2556-65.

210. The holding in a plurality decision is the "position taken by those Members who concurred in the judgment on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977). For a discussion of "the *Marks* rule," *see* Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 CONN. L. REV. 933 (2013). Under the *Marks* rule, *Alvarez* stands for the proposition that the Stolen Valor Act was an unconstitutional violation of free speech. The concept that the First Amendment protects some lies is supported by all three opinions in the case, as is discussed in this Part.

211. *Alvarez*,132 S. Ct. at 2546. "Absent from those few categories where the law allows content-based regulation of speech [obsenity or fraud, for example] is any general exception to the First Amendment for false statements." *Id.* at 2544.

212. *Id.* at 2545-46.

213. *Id.* at 2546.

214. *Id.*

215. *Alveraz*, 132 S.Ct. at 2547.

216. *Id.*

Amendment."[217] In other words, the "right to lie" that *Alvarez* clarifies seemingly does not protect lying to get a job, which ag-gag Category Three laws target. Justice Kennedy seems to equate lying on a job application with fraud because the lie secures a valuable exchange.[218]

The opinion goes on to uphold the government's compelling interest in banning Alvarez's lie, namely to protect "the integrity of the military honors system in general, and the Congressional Medal of Honor in particular."[219] Notwithstanding this interest of reinforcing the military mission, criminal prosecution of liars like Alvarez under the Act did not establish the necessary "link between the Government's interest in protecting the integrity of the military honors system."[220] In particular, the dynamics of free counter speech ("refutation") could offset the lie.[221] Further, "[s]ociety has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates."[222]

Even if refutation were insufficient to offset the lie of charlatans like Alvarez, criminal prosecution under the Stolen Valor Act does not satisfy the "exacting scrutiny"[223] free speech protection requires. Justice Kennedy opined that a government database of Medal of Honor winners was a mechanism that could protect the integrity of the military awards system

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217. *Id.* (emphasis added) (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976), for the proposition that fraudulent speech is unprotected).

218. *But see* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 512 (4th Cir. 1999) in which false statements in obtaining jobs for undercover reporters were indisputable. Yet no fraud damages could be attributable to the falsities because the undercover employees performed the jobs as hired and the plaintiff received its expected exchange for the compensation paid. *Id.* at 514. Further, plaintiff's alleged administrative damages for hiring these surreptitious employees, then having to replace them, were inconsistent with the at-will nature of the employment. They could quit or be fired anytime. *Id.* at 513.

219. *Alvarez*, 132 S. Ct. at 2548. In an unsuccessful prosecution that pre-dated *Alvarez*, a district court concluded that the objective of the Stolen Valor Act did ***not*** amount to a compelling government interest. United States v. Strandlof, 746 F. Supp. 2d 1183, 1190-91 (D. Colo. 2010). This was also the approach taken by the Ninth Circuit in striking down the prosecution in *Alvarez*. *See* United States v. Alvarez, 617 F.3d 1198, 1217 (9th Cir. 2010).

220. *Alvarez*,132 S. Ct. at 2549.

221. *Id.*

222. *Id.* at 2550.

223. *Id.* at 2551. *See also* Aaron H. Caplan, *Lies and Levels of Scrutiny*, AM. CONST. SOC'Y (June 28, 2012), https://www.acslaw.org/acsblog/lies-and-levels-of-scrutiny ("[Kennedy's] phrase 'exacting scrutiny' may ultimately become a recognized term of art that signals a form of super-strict scrutiny extremely intolerant (but still a little tolerant) of content-based speech restrictions.").

without any constraint on speech.[224] Accordingly, the statute was deemed unconstitutional.[225]

To determine if the right to lie would undermine No Lying ag-gag laws, especially in the face of Justice Kennedy's statement that equates lying in exchange for a job with fraud, *Alvarez* requires additional analysis. Justice Breyer's concurring opinion supports the conclusion that falsity is not categorically denied free speech protection.[226] In particular, "in technical, philosophical, and scientific contexts,"[227] deliberate falsehoods can be the basis for further examination and public debate that help reveal truth.[228] Under this analysis, farm workers who blow the whistle on farm abuses, revealing themselves to be surreptitious PETA activists or food safety reporters, present just the kind of a case when a "'clearer perception and livelier impression of truth, [is] produced by its collision with error.'"[229] In fact, Justice Breyer's discussion here reveals the free speech concerns with Category One and Two laws against recording and distributing recordings also. The farm worker who is simultaneously a PETA activist only reveals his Category Three – No Lying violation upon release of recordings in violation of Categories One and Two. Accordingly, the clearer perception of truth Justice Breyer seeks to protect actually emerges with a trifecta of ag-gag violations.

The classic whistleblower free speech case, *Food Lion Inc. v. Capital Cities/ABC, Inc.*,[230] revealed just this combination of violations encompassed by ag-gag Categories One, Two and Three. Two ABC reporters for the show *PrimeTime Live* were hired at Food Lion supermarkets using fake identities, addresses, references, and personal histories, including the omission of their concurrent employment with ABC.[231] They intended to film food handling practices in the stores using concealed cameras and microphones.[232] Today, their behavior in getting and performing these supermarket jobs clearly would fall within Category One – No Recording and Category Three – No Lying laws, if the work had been at an agricultural facility. Eventually, *PrimeTime Live* broadcast their undercover footage of

224. *Id.*
225. *Alvarez*, 132 S. Ct. at 2537.
226. *Id.* at 2553.
227. *Id.*
228. *Id.* (internal citations omitted). No such case was presented in *Alvarez*, however: "[t]he dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts." *Id.* at 2552.
229. *Alvarez*, 132 S. Ct. at 2553 (quoting JOHN STUART MILL, ON LIBERTY 15 (Blackwell ed. 1947)).
230. *See* Food Lion, *supra* note 218.
231. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 510 (4th Cir. 1999).
232. *Id.*

Food Lion employees repackaging fish beyond its expiration date, grinding beef after its expiration date with fresh beef, and coating chicken with barbeque sauce to mask its smell.[233] This action in an agricultural employment setting would amount to violations of Category Two – No Distributing. Just as Justice Breyer opined in *Alvarez*,[234] the employees' lies in *Food Lion* were necessary to reveal a clearer picture of the truth. In an agricultural setting, however, ag-gag laws could undermine that revelation.

Like Justice Kennedy, Justice Breyer describes justifiable crimes against lying, such as perjury and false claims of terrorism.[235] Torts or other civil claims such as fraud, defamation, and trademark infringement can also withstand free speech scrutiny.[236] These examples, however, usually require "proof of specific harm to identifiable victims."[237] In concurring that the Stolen Valor Act was unconstitutional, Breyer found no such limitations on its reach.[238] The Act forbids a lie "in contexts where harm is unlikely or the need for the prohibition is small."[239]

Focusing on this part of Justice Breyer's opinion, farm interests in Idaho, Iowa and Utah could argue that Category Three – No Lying laws are distinguishable from the Stolen Valor Act because they prevent direct harm from a whistle-blowing employee. This ag-gag defense has an obvious, perverse twist. Farms need protection from animal or food safety activists only to hide animal cruelty or unsafe food practices. Category Three – No

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233. *Id.* at 511.
234. Alvarez, 132 S. Ct. at 2552-54.
235. *Id.* at 2554.
236. *Id.*
237. *Id.* For a discussion of harm-based free speech jurisprudence, see Clay Calvert & Rebekah Rich, *Low-Value Expression, Offensive Speech, and the Qualified First Amendment Right to Lie: From Crush Videos to Fabrications About Military Medals*, 42 U. TOL. L. REV. 1, 31-32 (2010); *see also* Bollard, *supra* note 17, at 10975.
238. 132 S. Ct. at 2555.
239. *Id.* Justices Breyer and Kagan depart from the four justices who form the *Alvarez* plurality in opining that the substantial government interest in protecting military honors could be satisfied with a more finely tailored statute that included a requirement of actual knowledge of material harm. *Id.* at 2555-56. Taking that cue, Congress passed the Stolen Valor Act of 2013 which criminalizes lying about military honors "with the intent to obtain money, property, or other tangible benefit." 18 U.S.C. § 704(b). One commentator analyzes whether lies now criminalized under this new Stolen Valor law could withstand constitutional scrutiny under the commercial speech doctrine because the illegal statements would be self-promotion akin to advertising. *See* Alison L. Stohr, Comment, *Valor for Sale: Applying the Commercial Speech Exception to Self-Promoting Individuals*, 85 TEMP. L. REV. 455, 476 (2013). Despite concluding that all speech targeted by the new Stolen Valor law meets the underlying rationale of the commercial speech exception, *id.* at 479, Stohr rejects her espoused constitutional approach and calls for a reexamination of the commercial speech exception altogether. *Id.* at 482-83.

Lying laws are only defensible to protect business operations and profitability when they quell disclosure of potential public harms. This use of Breyer's opinion that lies can be prosecuted to avoid obvious harm,[240] seems indefensible considering his opinion also supports the principle that some lying needs constitutional protection to help reveal truth.

Again, *Food Lion*'s analysis about harm from lying undercover employees is instructive.[241] The *Food Lion* court upheld claims of trespass and breach of the duty of loyalty against the reporter/employees because they "had the requisite intent to act against the interests of their second employer, Food Lion, for the benefit of their main employer, ABC."[242] Similarly, trespass occurred by filming in non-public areas, directly adverse to Food Lion's interests.[243] Nevertheless, the loyalty and trespass violations in *Food Lion* could not be the basis for any damages plaintiff sought in the case from the economic fallout after the broadcast.[244] The lower court excluded damages from lost sales and harm to good will because they were not proximately caused by the loyalty and trespass torts.[245] Instead, these reputation-related damages directly resulted from lost consumer confidence about Food Lion's food handling practices that were exposed.[246] On appeal, the Fourth Circuit upheld that result but elevated the damage exclusion to a free speech issue by concluding that Food Lion could not recover these damages to reputation without proving the constitutional libel standard, namely knowledge of falsity or reckless disregard for the truth.[247] A public

240. For a discussion of torts that would protect against some of the legitimate harms that might arise from lies about military honors, see Lauren A. Valkenaar, Comment, *Civil Liability Approaches to the Stolen Valor Epidemic*, 44 ST. MARY'S L.J. 835, 852-77 (2013). As was noted above, legitimate harms are still actionable from behavior targeted in all ag-gag laws through civil tort claims. *See supra* Part II.E.

241. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999).

242. *Id.* at 516.

243. *Id.* at 518. By contrast, the court rejected the argument that misrepresentation on job applications turned the act of showing up to work into trespass because such misrepresentations did not nullify the employer's consent to enter the property to work. *Id.*

244. *Id.* at 524. The alleged financial effect of ABC's Food Lion expose'—over $1.3 billion in lost stock value. Felicity Barringer, *Appeals Court Rejects Damages Against ABC in Food Lion Case*, N.Y. TIMES (Oct. 21, 1999), http://www.nytimes.com/1999/10/21/us/appeals-court-rejects-damages-against-abc-in-food-lion-case.html.

245. Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956, 963 (M.D.N.C. 1997).

246. *See generally* Barringer, *supra* note 244.

247. *Food Lion Inc.*, 194 F.3d at 522 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)).

figure plaintiff cannot circumvent the elevated defamation standard by suing for other non-reputational torts.[248]

In reaching this free speech conclusion, the *Food Lion* court contrasted the damage claims from those in *Cohen v. Cowles Media Co.*[249] In *Cowles*, the Supreme Court said a news outlet could not avoid damages under generally applicable laws, even if payment hindered news gathering and reporting.[250] *Cowles* found that the promissory estoppel damages for lost income were unrelated to reputation and, thus, not subject to any special constitutional scrutiny.[251] The damages to reputation in *Food Lion* were the direct result of the publication.[252] Accordingly, the constitutional libel standard applied (which the supermarket could not possibly meet since the broadcast was true).[253]

In summary, *Food Lion* reveals that whistleblowing employees may be liable to their former employers for contract damages, but not if the employment was at will. Further, whistleblowing likely violates an employee's duty of loyalty, but that duty cannot support a claim for damages to reputation unless the employer can meet the First Amendment malice standard. Arguably, Justice Breyer's free speech exception for lies that cause harm must be understood within the purview of *Food Lion*. Harm to reputation from the lies of an activist applicant/whistleblowing employee who exposes food safety violations should not be actionable by agriculture employers.[254]

Justice Alito's dissenting opinion in *Alvarez* also focuses on harms that need statutory protection by pointing out the "proliferation of false claims

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248. *Id.* at 522 (citing Hustler Magazine v. Falwell, 485 U.S. 46 (1988)). An elevated proof requirement also has been applied to private plaintiffs (such as a farm) when the subject of the alleged defamation is a matter of public concern. *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776–77 (1986) (holding that the burden of proving falsity lies with the private plaintiff when the defendant is a media defendant speaking on a matter of grave public concern); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 784 (1985) (extending the *Hepps* burden of proof to a private plaintiff suing a non-media defendant).

249. *Food Lion Inc.*, 194 F.3d at 523 (comparing the damages claims with those in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991)).

250. *Cohen*, 501 U.S. at 669; *see also* Bollard, *supra* note 17 and accompanying text.

251. *Id.* at 670-71.

252. *Food Lion Inc.*, 194 F.3d at 523.

253. *Id.* at 523-24. One commentator argues that ag-gag laws are distinguishable from the promissory estoppel claim in *Cowles* because they are not generally applicable laws, but rather "were drafted to stop expressive activity at agricultural operations . . . ." Bollard, *supra* note 17, at 10971. For this reason, ag-gag laws should fall under strict scrutiny. *Id.* at 10972.

254. *See* People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269, 1276 (Nev. 1995) (reaching a similar conclusion under Nevada constitutional law).

concerning the receipt of military awards."[255] Intangible debasing of military awards is the most common harm from "stolen valor."[256] For the dissent, it sufficed that Congress reasonably concluded that a comprehensive database of real award winners could not be compiled and that counter speech would not adequately refute false claims.[257]

Like the other opinions, the dissent notes that torts and crimes targeting falsity that have withstood First Amendment challenges.[258] Nevertheless, the dissent concedes that prosecuting some lies still could chill other protected speech.[259] Here the dissent is instructive regarding Category Three – No Lying laws:

> [t]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. . . . The point is not that there is no such thing as truth or falsity . . . , but rather that it is perilous to permit the state to be the arbiter of truth.[260]

These statements suggest that even the dissenters might shield the lies targeted in Category Three since the lies are motivated by a concern for food safety, and the state should not stand in the way of that information.[261]

Minimally, all of the opinions in *Alvarez* suggest that prosecutions under a Category Three – No Lying law will require a case-by case analysis of the implications to truth regarding food safety and animal abuse. Beyond restricting open discourse, these ag-gag laws potentially harbor unsafe,

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255. United States v. Alvarez, 132 S. Ct. 2537, 2558 (2012).
256. *Id.* at 2559.
257. *Id.* at 2560.
258. *Id.* at 2561-62.
259. *Id.* at 2563-64.
260. Alvarez, 132 S. Ct. at 2564. The dissent concludes that lies proscribed under the Stolen Valor Act present no such risks. *Id.*
261. A district court that ***upheld*** the Stolen Valor Act prior to *Alvarez* also suggested constitutional concerns that would apply to Category Three – No Lying laws. Prosecution of lying "may create conflict between the motivations of the government and the imperatives of free speech." United States v. Robbins, 759 F. Supp. 2d 815, 820 (W.D. Va. 2011).

abusive farms from public scrutiny by criminalizing the very acts that could bring the safety abuses to light, namely lying to gain access to the farm.[262]

Further, many of the rationales that supported striking down the Stolen Valor Act support a conclusion that Category Three – No Lying laws are unconstitutional on their face. Like the Stolen Valor Act, all ag-gag statutes employ content-based mandates by protecting specific farms and farm practices.[263] Additionally, the Category Three – No Lying laws go beyond content-based restrictions to criminalizing the motives of the speaker who is a farm job applicant. None of the Idaho, Iowa, or Utah laws are limited to particular factual misstatements, such as using a false name, address, or employment history in a job application.[264] On the contrary, all target the person's objective in seeking the job.[265] The statutes outlaw lying to get a job "with the intent" to perform acts on the job contrary to the employer's interests in maintaining farm secrecy.[266] As such, Category Three – No Lying laws target the farm job applicant's viewpoint that possible food safety or animal welfare wrongs are occurring and should be exposed.

Arguably, if the employee performs the job as promised for the compensation exchanged, there is not the kind of exchange fraud that *Alvarez* suggested was unprotected speech.[267] The intent to come to work and to work for pay is not fraudulent if that is what the undercover worker does in fact do.[268] Ag-gag employment fraud occurs when the worker uncovers and discloses unfavorable information on the job. Without some safety or animal abuse to uncover, the employee hired with a secret motive to uncover such abuse would just go about his or her job, as hired and paid to do. So-called agriculture employment fraud only applies when the employee's fraudulent

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262. *See* Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 164-65; *see also* Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107 (2006).

263. Only North Carolina's proposed law would extend its provisions about lying to get a job to any employment, not just agriculture jobs. *See supra* notes 97-104 and accompanying text.

264. *See supra* notes 32-45, 51-55 and accompanying text.

265. *See supra* notes 32-45, 51-55 and accompanying text.

266. *See supra* notes 32-45, 51-55 and accompanying text.

267. *See* United States v. Alvarez, 132 S. Ct. 2537 (2012).

268. In *Food Lion*, the court held that none of the damages alleged by Food Lion could be attributable to employee falsities. Food Lion Inc., v. Capital Cities/ABC Inc., 194 F.3d 505, 514 (4th Cir. 1999). The undercover employees performed the jobs as hired, so Food Lion received its expected exchange for the compensation it paid them. *Id.* at 514. Further, Food Lion's alleged administrative damages for hiring two employees, then having to replace them, were inconsistent with the at-will nature of the employment. *Id.* at 513. Both could quit or be fired anytime, so misstatements at hiring were not the cause of any administrative harm. *Id.*

access to the workplace actually exposes food safety violations and/or animal abuse on the job.[269]

Ag-gag criminal prosecutions seem to present exactly the grave and unacceptable danger of suppressing truthful speech that even the *Alvarez* dissenters acknowledged is protected under the First Amendment.[270] The significant negative public reaction to all ag-gag legislation[271] reflects a similar concern, that only farms with something to hide need protection from job-seeking activists.

In an analysis based on *Alvarez* of the constitutionality of false campaign and election speech laws, one commentator raises concerns about political motivation and selective prosecution:

> Although the Court's decision in *Alvarez* is badly fractured, there seems unanimous skepticism of laws targeting false speech about issues of public concern and through which the state potentially could use its sanctioning power for political ends. Especially dangerous are criminal laws punishing false speech that could lead to selective criminal prosecution.[272]

These concerns about political motivation and selective prosecution seem equally applicable to enforcement of agriculture protectionist laws in states whose economies are dominated by agricultural interests. As this commentator notes, all of the *Alvarez* opinions suggest these laws violate important free speech objectives.[273]

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269. Some tort cases distinguish between an "intention contained in a promise," such as the promise to work for compensation, which is not actionable in deceit, and a "collateral intent, for which the action will lie." RESTATEMENT (SECOND) OF TORTS § 530 (1977) (Reporter's Note). *See also* Woods v. Scott, 178 A. 886 (Vt. 1935) (upholding directed verdict for defendant when he hired and later fired a housekeeper with the original hope of making her his mistress) (contrary to the Restatement's characterization, the underlying intent to make plaintiff his mistress was not found actionable in this case); Comstock v. Shannon, 73 A.2d 111 (Vt. 1950) (finding that a broken promise did not amount to fraud, but the false statement of an intent not to compete in the future did). Category Three – No Lying laws seem to zero in on this sliver of tort cases when they criminalize the collateral intent to investigate, unrelated to the non-fraudulent promise to work.

270. *See* United States v. Alvarez, 132 S. Ct. 2537, 2556-65 (2012).

271. *See* Civita, *supra* note 31 and accompanying text.

272. Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 69 (2013).

273. *See id.*

B. Free Speech Issues in Mandatory Disclosure Laws

This discussion has referred to Category Four laws as "Mandatory Disclosure" for ease of reference. In fact, this Category actually comes in two varieties. Mandatory relinquishment laws require the maker of a recording to surrender it to authorities within a short period (usually twenty-four to seventy-two hours).[274] Alternatively, mandatory reporting laws simply require certain classes of people to report suspected animal abuse to authorities, again within a short time.[275]

Missouri is the only state to enact a Category Four ag-gag law thus far.[276] Missouri's law makes it illegal for "farm animal professionals" to fail to relinquish to authorities within twenty-four hours any recordings they make that they believe depict animal abuse or neglect.[277] This law only applies to farmworkers recording animal abuse.[278] It does not apply to recordings of other behavior that might pose food safety violations.[279]

Such a short reporting period makes it impossible to demonstrate a pattern of animal abuse or neglect. With a twenty-four hour reporting period, agricultural facilities always will be able to assert that the recorded behavior was a one-time event, not normal business practice. Moreover, since farmworkers under USDA jurisdiction currently have no federal whistleblower protections,[280] there is a good chance that an employee who complies with the law and submits evidence to authorities of the employer's animal abuse will be fired and have no ability to document further incidents that could prove a pattern of abuse.

There are several ways Category Four laws might be analyzed under the First Amendment.[281] Based on the analysis a court might apply to these

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274. From 2013-2014, Category Four bills that included a relinquishment requirement were proposed in New Hampshire and Tennessee, among others. *See* H.R. 110, 2013 Sess. (N.H. 2013), *available at* https://legiscan.com/NH/text/HB110/id/679691/New_Hampshire-2013-HB110-Introduced.html; S. 1248, Gen. Assemb., 2013 Sess. (Tenn. 2013), *available at* http://www.capitol.tn.gov/Bills/108/Bill/SB1248.pdf; H.R. 1191, Gen. Assemb., 2013 Sess. (Tenn. 2013), *available at* http://www.capitol.tn.gov/Bills/108/Bill/HB1191.pdf.

275. *See supra* notes 90-96 and accompanying text regarding Nebraska's illustrative proposal.

276. MO. REV. STAT. § 578.013 (2014).

277. *Id.*

278. *Id.*

279. *Id.*

280. *See supra* notes 141-44 and accompanying text.

281. As was noted above, Mandatory Disclosure laws can impose an unconstitutional obligation to self-incriminate if the disclosure reveals that the reporter also violated a Category Three Law by lying to obtain employment that resulted in witnessing the animal abuse. *See supra* notes 90-103 and accompanyting text. There are additional areas

Category Four laws, this Part concludes with application of strict and intermediate scrutiny.

1. Compelled Speech

"The right not to speak is as much a constitutional freedom as is the right to speak."[282] Only the speaker, not the government, possesses "the autonomy to choose the content of his own message."[283] Compelled speech cases often involve utterances that convey opinion or belief.[284] Free speech autonomy, however, applies "equally to statements of fact the speaker would rather avoid."[285] For example, in *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, the Court threw out a law requiring professional charitable fundraisers to disclose to donors what percentage of funds raised actually went to the charity.[286] The solicitations for contributions were treated as part of the non-profit's overall charitable or social message, which was the charity's prerogative to craft without the government's mandate about the expense of solicitation.[287] The Court recognized that earlier precedent had been guided by "the principle that '[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind,'" but it rejected the argument that disclosures of fact, rather than opinion, fell outside the boundaries of First Amendment protection.[288]

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of constitutional scrutiny for Category Four laws that are outside the scope of this analysis. One is whether the mandatory relinquishment laws could constitute a condemnation that requires just compensation and procedural due process. Another is that crimes of omission are generally disfavored and might afford some constitutional protection as such or in combination with a First Amendment theory. *See,e.g.*, Michael M. O'Hear, *Sentencing the Green-Collar Offender: Punishment, Culpability, and Environmental Crime*, 95 J. CRIM. L. & CRIMINOLOGY 133, 177-78 (2004).

282. CHEMERINSKY, *supra* note 198, at 1009.

283. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995).

284. *See id.* (holding that a private parade organizer could not be compelled to include an LGBT-pride marching unit); *see also* Wooley v. Maynard, 430 U.S. 705, 714 (1977) (striking down a New Hampshire law requiring all noncommercial vehicles to display a license plate bearing the state's motto "Live Free or Die"); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (striking a law requiring school children to salute the flag).

285. *Hurley*, 515 U.S. at 573.

286. Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781 (1988).

287. *Id.* at 798.

288. *Id.* at 797-98.

Some scholars have interpreted *Riley* broadly.[289] In dicta, however, the *Riley* Court opined that certain factual disclosures might not violate free speech, such as fundraisers' professional status.[290] Proponents could characterize Category Four – Mandatory Disclosure requirements as just such factual exchanges, rather than compulsion that restricts the "individual freedom of mind."

Alternatively, many "freedom of mind" decisions are made when creating a recording, even if no post-film editing is done. The creator decides what to film, how long to film, whether to include a wide angle for context or zoom in for effect, and how best to capture the light, all of which speak to the creator's opinion of the event being recorded. Although some of these choices may be limited by the logistics of secretly recording suspected abuse, the capacity for those decisions is present. Additionally, when to release a film (or an eyewitness account under mandatory reporting) is part of the whistleblower's message about the extent of perceived animal or safety abuses at the farm. *Riley* suggests the worker, not the state, gets to choose how to craft and disseminate that message, including when to refrain from disseminating it until the report completely reflects scenes the worker witnessed, which might take more than twenty-four hours.[291]

The prohibition on compelled speech protects listeners as well as speakers.[292] Accordingly, any law that dictates early recounting of animal abuse that a farm worker witnessed might distort listeners' rights to learn the complete picture of animal treatment at the farm that otherwise would emerge if the whistleblower were not compelled to report earlier than he or she would choose freely.

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289. *See, e.g.*, Samuel G. Brooks, Comment, *Confession and Mandatory Child Abuse Reporting: A New Take on the Constitutionality of Abrogating the Priest-Penitent Privilege*, 24 BYU J. PUB. L. 117, 133 (2009) ("[A]s long as the individual would not otherwise make the statement, even compulsion to disclose facts interferes with this freedom of mind and, therefore, falls within the protections of the First Amendment.").

290. *Riley*, 487 U.S. at 795, 799 n.11. Justice Scalia was so opposed to the dicta in footnote 11 that he wrote his own concurring opinion disavowing it. *Id.* at 803-04.

291. *See generally id.*

292. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (holding "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . [and i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial."); *see also* Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 384-85 (2008) (discussing how listener interests rather than speaker interests are paramount in compelled speech cases).

2. Content-Based Restriction on Speech

Short fuse mandatory disclosure requirements also may constitute content-based restrictions on speech because they restrict based on subject matter and viewpoint.[293] As noted, the laws generally restrict reports or creation of videos that evidence a pattern of livestock abuse or neglect over a period of time. In Missouri, recordings that track treatment of other vulnerable populations can be made over time.[294] A recording of elder abuse need not be turned over to authorities at all, and a report of the abuse need only be made within a "reasonable time."[295] Suspected pet abuse requires neither video relinquishment nor reporting.[296] In comparison, the Category Four – Mandatory Disclosure laws restrict the subject matter of the report to animal abuse recorded by a farmworker during one work shift.

Further, Category Four laws are viewpoint-based. "Animal abuse" or "neglect" is in the eye of the beholder.[297] As the discussion of California's "downer cow" law in *Harris* reflected,[298] California voters and USDA regulators differed in their views of what should and should not be allowed in the treatment of livestock.[299] The same is true of California voters versus others regarding the humane treatment of caged farm animals, such as egg-laying hens.[300] Yet, because short reporting periods prevent recordings of

293. *But see* Bollard, *supra* note 17, at 10971 (arguing that ag-gag laws cannot be direct restrictions on speech because there is no constitutional right to record on private property).

294. *See* MO. REV. STAT. § 198.070 (2014) (providing an example of reporting requirements with respect to other populations).

295. *See* MO. REV. STAT. § 198.070(3) (2014). There is no discussion of relinquishing recordings of elder abuse, and the "reasonable time" for reporting seems likely to extend beyond the twenty-four hours mandated for farm workers. Moreover, because there is no relinquishment requirement for evidence of elder abuse, employers are less likely to be able to identify and retaliate against those who report abuse. This means a nursing home aid, for instance, could create a video documenting a pattern of elder abuse so long as he reported each instance of suspected abuse to authorities within "a reasonable time."

296. *See* MO. REV. STAT. § 578.013(1) (2013) (only recordings made by "farm animal professionals" of suspected abuse of "farm animals" need be relinquished). If the intent of the quick reporting period was to allow law enforcement to stamp-out abuse immediately, the state's concern should equally apply to animals kept as pets, which are traditionally afforded greater welfare protections than livestock. *See, e.g.*, Mark Bittman, *Some Animals Are More Equal Than Others*, N.Y. TIMES (Mar. 15, 2011, 8:30 PM), http://opinionator.blogs.nytimes.com/2011/03/15/some-animals-are-more-equal-than-others/?_php=true&_type=blogs&_r=0.

297. The videographer must turn over a recording he or she "believes" depicts farm animal abuse or neglect. MO. REV. STAT. § 578.013(1) (2013).

298. *See* Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965 (2012).

299. *See generally id.*

300. *See supra* notes 181-188 and accompanying text.

continual violations, Category Four laws effectively impose a "belief" on the whistleblower that a single incident of perceived harsh treatment constitutes abuse or neglect. A farmworker who believes that animal neglect or abuse is only clear from a pattern or practice of behavior over a period of time must choose amongst declaring that he believes something that he actually does not, violating the law, or turning a blind eye. Viewed in this light, Category Four laws are content-based restrictions that will pass constitutional muster only if they can survive strict scrutiny.

3. Restriction on Association

Similar to a Category Three – No Lying law,[301] Category Four – Mandatory Disclosure may infringe on freedom of association.[302] Legislative history suggests that proponents of ag-gag bills believe people who make such recordings are affiliated with animal rights groups, and many people who make such recordings are so affiliated.[303] Accordingly, a Mandatory Disclosure law effectively requires videographers to "out" themselves as a member of such a group. The content of the recording is likely to point to its source because few people will have access to a particular section of a particular animal facility on any given day. Moreover, the Missouri law, like other proposed Category Four laws, does not have a provision for anonymous video relinquishments.[304] In fact, it seems unlikely that anonymous drops would be allowed because another provision of the act makes it illegal to edit the recording in any way prior to relinquishment.[305] The state would have no way to enforce that provision if it allowed anonymous drops.

In 1958 the Supreme Court declared:

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association. . . . This Court has recognized the vital relationship between freedom to

301. *See* Bollard, *supra* note 17, at 10974.

302. The freedom to associate is a Due Process right closely aligned with the freedom of speech. *See* Shelton v. Tucker, 364 U.S. 479, 485-87 (1960).

303. *See* Bollard, *supra* note 17, at 10972 (noting that the sponsors of the Iowa and Utah bills collectively asserted that their bills were directed at "national propaganda groups," "activists," "the vegetarian people," and "extremist vegans").

304. *See* MO. REV. STAT. § 578.013 (2013).

305. *See* MO. REV. STAT. § 578.013(2).

> associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.[306]

Despite this strong rhetoric, the Court has only invoked the freedom of association to strike down regulations that directly require disclosure of affiliations.[307] In *NAACP v. Alabama*, the Court struck down a state law that required the NAACP to disclose its membership lists.[308] Soon thereafter, the Court struck down a state law that required teachers to disclose their affiliations on a yearly basis.[309] In order for these precedents to apply to Category Four ag-gag laws, the Court would have to extend its holdings to situations in which the law indirectly results in an affiliation being revealed. Such an extension would be justified if state legislative histories suggest (1) an assumption that only those affiliated with animal rights groups make recordings of livestock abuse, (2) animus toward such groups, and (3) an intent to use the mandatory disclosure requirement to identify group affiliates.[310]

4. Restriction on Newsgathering

If a court declines to find that a Category Four law constitutes compelled speech or a direct restriction on speech or association, there is a good chance it will characterize the law as a restriction on newsgathering.

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306. NAACP v. Alabama, 357 U.S. 449, 462 (1958). The authors do not contend that everyone creating a recording will be affiliated with an animal rights group, let alone identify as an activist, vegetarian, or "extremist vegan". *See* Bollard, *supra* note 17, at 10972. Nonetheless, proponents of the ag-gag laws, at least in Iowa and Utah, believe that those are the people their bills will target, and their statements to that effect demonstrate that they are targeting advocacy groups that espouse dissident beliefs. *See* Bollard, *supra* note 17, at 10965-66, 10972. *See generally* COLIN SPENCER, THE HERETIC'S FEAST: A HISTORY OF VEGETARIANISM (Univ. Press of New England 1995) (providing a history of vegetarianism and animal rights sentiment, and showing how both have consistently been viewed as subversive by society at large).

307. *See NAACP*, 357 U.S. at 449.

308. *Id.*

309. *See* Shelton v. Tucker, 364 U.S. 479 (1960).

310. Indiana's failed attempt to create a registry of ag-gag offenders lends credence to the notion that one objective of the current protectionist agenda is to "take names" of ag enemies. *See supra* notes 80-82 and accompanying text.

Generally applicable laws that impinge upon newsgathering activities of "the press"[311] are not entitled to heightened First Amendment review the way they would be if they impinged upon publication.[312] For example, "generally applicable laws" include trespass, invasion of privacy, or duty of loyalty. Nevertheless, even while holding the opposite, the Supreme Court has indicated in dicta that there should be protections for newsgathering activities.[313] In 1972, Justice White proclaimed: "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[314] Some scholars have asserted that Justice White's language has influenced courts to apply heightened review to such laws, despite precedent like *Branzburg* to the contrary.[315] The result has been a great deal of confusion and commentary arguing the need for clarity and reform.[316]

The best argument against the newsgathering precedents that do not protect speech, is that Category Four ag-gag laws are not "general laws" like trespass or invasion of privacy, because of their narrow focus on farms and farm workers.[317] That returns the argument to content-based restrictions and strict scrutiny. The scrutiny that applies to Category Four under the various foregoing speech analyses is discussed next.

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311. There is good reason to believe that newsgathering privileges (to the extent courts apply any) afforded to "the press" would apply also to "good faith," whistleblowing employees who had no intent upon accepting employment to record and distribute footage of illegal activity, but upon seeing such activity decide to record and disseminate evidence of the wrongdoing. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring) ("[T]he First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms."). *See also* Lambert v. Polk Cnty., Iowa, 723 F. Supp. 128, 133 (S.D. Iowa 1989) ("It is not just news organizations . . . who have First Amendment rights to make and display videotapes of events—all of us . . . have that right.").

312. *See* Branzburg v. Hayes, 408 U.S. 665, 682 (1972) (holding that the First Amendment did not insulate reporters from criminal sanctions for refusing to testify before a grand jury even where their testimony might reveal confidential news sources, reasoning that. . ."the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."). *See also* Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

313. *Branzburg*, 408 U.S. at 681.

314. *Id.*

315. *See* Bollard, *supra* note 17, at 10966-67.

316. CHEMERINSKY, *supra* note 198, at 1164.

317. *See* MO. REV. STAT. § 578.013, *supra* note 277 and accompanying text.

5. Application of Strict and Intermediate Scrutiny

If a court found that Category Four laws constituted compelled speech, content-based speech restrictions, or restrictions on association, the laws would not withstand strict scrutiny. States would have to demonstrate that their ag-gag laws were narrowly tailored to protect a compelling government interest.[318] Regardless of what the states may say about a concern for animal abuse or food safety, if a court considers the legislative history behind these laws it will be clear that suppressing speech is their underlying intent.[319] If the real interest is protecting the reputation of the animal farming industry by shielding worse evidence of repeated unsafe, abusive behavior, that interest is related to the suppression of free speech and cannot withstand any scrutiny.[320] "Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or to manipulate the public debate through coercion rather than persuasion."[321] If a court accepts that the real intent of Category Four laws is speech suppression, then the laws fail any free speech scrutiny under the first step of the analysis.

Even if a court would countenance that timely reporting of suspected animal abuse is the compelling interest these laws promote, states cannot show that the laws are narrowly tailored to that interest. There are numerous ways that states like Missouri could protect its interest in uncovering farm animal abuse that have no restrictions on speech. The state could create a voluntary, anonymous reporting hotline for farm animal abuse. The state could pass whistleblower protection for farm workers to report abuse without negative job outcomes. The state could create a self-reporting system for farms to obtain reduced penalties for animal abuse violations that are self-reported (consistent with the HACCP food safety model, too). All of these

318. *See,e.g.*, Riley, 487 U.S. at 800 ("[There is a] First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored."); *see also* Bollard, *supra* note 17, at 10975-77 (analyzing ag-gag laws under strict scrutiny).

319. *See* Landfried, *supra* note 17, at 390-91 ("[Category Three and Four ag-gag laws] are deliberately crafted to limit expression"). *See also* Bollard, *supra* note 17, at 10964-65 (discussing the legislative history of Iowa and Utah's ag-gag laws and the national agribusiness lobbying groups that have been pushing bills around the country).

320. Bollard, *supra* note 17, at 10977. This analysis has considered the constitutionality of the different types of ag-gag laws individually. In practice, states often package two or more different categories of ag-gag laws together. When a court reviews those laws, it will likely look to the law as a whole to determine the governmental interest and intent.

321. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994). *But see* Bollard, *supra* note 17, at 10971 (arguing that ag-gag laws cannot be direct restrictions on speech because there is no constitutional right to record on private property).

options directly accomplish the alleged government interest in uncovering farm animal abuse. When state legislatures opt for a mandatory disclosure alternative that only marginally protects farm animals and prevents farm workers from documenting a habit or pattern of cruelty, it casts doubt on the alleged government interest and fails strict scrutiny.

A court may effectively apply intermediate scrutiny if it views Mandatory Disclosure laws as restrictions on newsgathering rather than direct restrictions on speech or association.[322] A law will pass intermediate scrutiny "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[323]

Even if a state has a legitimate economic interest in protecting its agricultural citizens and employers, it is still unclear that Category Four laws impose incidental restrictions on First Amendment freedoms that are no greater than is essential in the furtherance of that interest. Again, if a state wants to protect the reputation of its agricultural facilities it could do many other things that do not hinder speech at all. For instance, it could provide or enhance state-offered training programs and voluntary audits and feedback on good husbandry and food safety practices. It also could provide incentives to companies that provide greater transparency to the public on their food handling and animal treatment practices. States do not have to resort to shrouding their agricultural facilities from the public eye. In fact, the very act of doing so harms their reputation by signaling that they have something to hide.[324] This contradicts the state's interest in protecting its agriculture economy, rather than serving that interest.

Historically, mandatory reporting has been limited to vulnerable populations such as the elderly and the disabled.[325] Further, mandatory reporting has been imposed only on those with "special relationships" to those vulnerable populations, such as medical professionals, clergy, or law enforcement.[326] Category Four – Mandatory Disclosure laws apparently consider farm animals akin to those other vulnerable populations and create

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322. *See* Bollard, *supra* note 17, at 10974-75.

323. United States v. O'Brien, 391 U.S. 367, 377 (1968).

324. *See* Civita, *supra* note 31 and accompanying text (discussing the public view of ag-gag laws as a method for farms to cover up wrongdoing).

325. *See, e.g.*, Lori Stiegel & Ellen Klem, *Reporting Requirements: Provisions and Citations in Adult Protective Services Laws, By State*, A.B.A. COMM'N ON L. & AGING FOR NAT'L CTR. ON ELDER ABUSE (2007), http://www.americanbar.org/content/dam/aba/migrated/aging/docs/MandatoryReportingProvisionsChart.authcheckdam.pdf.

326. *Id.*

a special relationship in anyone who works around those animals. That expansion of an otherwise limited history of mandatory reporting calls into question the wisdom of Category Four laws and their constitutionality under the First Amendment.

VI. RECOMMENDATIONS AND FUTURE RESEARCH

The most direct way to limit state agricultural protectionism and protect food safety would be through express federal preemption. Legislative attempts at federal protectionism like PICA,[327] however, and the fact that Congress has yet to create any whistleblower protection for workers within USDA's jurisdiction,[328] suggest that express federal preemption is not on the horizon. Similarly, the whistleblower protection in FSMA lacks any express preemptive effect, even though whistleblowers have been the impetus for federal food safety legislation historically.[329]

At best, successful implied preemption defenses in the pending Utah and Idaho challenges to those ag-gag laws might give express preemptive legislation some traction.

Possibly more effective would be pressure from state lawmakers without protectionist laws, to encourage their peers to repeal food libel and ag-gag laws, and to refrain from introducing any new legislation like that discussed in Part II. If legislators feel compelled to appease the agricultural, industrial complex in their states, however, they should consider only an ag-gag law like Montana's that incorporates a defamation standard.[330] At least this approach protects the truth and good faith mistakes, and is also underpinned by a long history of defamation case law.

Next, legislative peers in the "locavore-friendly" states should urge protectionist-leaning states to shift to local-friendly efforts and curb their zeal for protecting industrial farming.[331] Although promoting local food is not mutually exclusive with agricultural protectionism, the local food

327. *See supra* notes 177-89 and accompanying text.

328. *See supra* Part III.

329. Slaughterhouse whistleblowers have been credited with aiding the passage of both the 1906 and 1967 Meat Inspection Acts. *See* Brief for Reporters Committee for Freedom of the Press et. al. as Amici Curiae Supporting Plaintiffs at 2-3, Animal Legal Def. Fund v. Herbert, No. 2:13-cv-00679-RJS (D. Utah Jan. 15, 2014).

330. *See supra* notes 21-26 and accompanying text.

331. Ironically, Iowa has been at the forefront of promoting the local farm movement, while also legislating protectionist farm laws discussed herein. Leah Zerbe, *The Best & Worst States for Locally Grown Food*, RODALE NEWS (May 15, 2012), http://www.rodalenews.com/local-food-markets.

movement is seen as "push back" against industrialized food production.[332] As one commentator asserts, "complexity, industrialization, and globalization of food production," make food less safe.[333] Lawmakers in states with protectionist legislation should reconsider who and what they are protecting, and at what cost, when they continue to shield industrial food producers with legislation that suppresses criticism. Protectionist-leaning legislators need to expand their views about economic value to their states, rather than just accommodating the wants of big industrial operations that seek protection under food libel and ag-gag laws.[334] Local food production can benefit entire communities economically through banking, machinery sales, services, and transportation.[335]

Nevertheless, the next protectionist salvo may directly pit industrial farming against small urban and suburban farms. In a classic example that everything old is made new again, the "right to farm" is now reappearing in the protectionist landscape, and taking on a decidedly small farm versus industrial agricultural flavor.[336] Recently, Michigan's Commission of Agriculture and Rural Development ruled that its statutory right to farm did not extend to areas primarily zoned residential.[337] The ruling is perceived to be a direct attack by industrial agriculture against the local food movement, because it permits local governments to ban backyard livestock farms.[338] The Michigan Farm Bureau supported the changes, but challenged the characterization that its membership organization is against small or urban farms.[339]

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332. Nicholas R. Johnson & A. Bryan Endres, *Small Producers, Big Hurdles: Barriers Facing Producers of "Local Foods"*, 33 HAMLINE J. PUB. L. & POL'Y 49, 56-58 (2011).

333. Denis W. Stearns, *A Continuing Plague: Faceless Transactions and the Coincident Rise of Food Adulteration and Legal Regulation of Quality,* 2014 WIS. L. REV. 421, 423 (2014).

334. For a discussion of whether locally-produced food is safer than industrialized farm production, *see* Johnson & Endres, *supra* note 332, at 91-96.

335. *Id.* at 97-99.

336. *See* Richard R. Oswald, *Amendment One would not Protect Missouri Family Farms,* MO. FARMER TODAY (July 2, 2014, 10:30 PM), http://m.missourifarmertoday.com/news/opinion/amendment-one-would-not-protect-missouri-family-farms/article_b1335ef6-0134-11e4-be2f-0019bb2963f4.html.

337. *Michigan's Right to Farm Act FAQ*, DEP'T. OF AGRIC. & RURAL DEV., http://www.michigan.gov/documents/mdard/Michigans_Right_to_Farm_Act_Frequently_Asked_Questions_-_August_28_2014_455493_7_466935_7.pdf (last updated Aug. 28, 2014).

338. *See* Rick Pluta, *State Agriculture Commission Approves Backyard Livestock Rule*, MICH. RADIO (Apr. 28, 2014, 10:58 PM), http://michiganradio.org/post/state-agriculture-commission-approves-backyard-livestock-rule.

339. Matt Kapp, *MFB Statement Regarding Changes to Right to Farm GAAMPs*, MICH. FARM BUREAU (May 5, 2014),

Escalating this protectionist effort in 2012, North Dakota enacted the first ***constitutional*** right to farm.[340] The provision reads: "The right of farmers and ranchers to engage in modern farming and ranching practices shall be forever guaranteed in this state. No law shall be enacted which abridges the right of farmers and ranchers to employ agricultural technology, modern livestock production, and ranching practices."[341] Like the recent Michigan regulatory development, the amendment's protection of "modern" farming and "agricultural technology" evoked criticism that the state sought only to protect industrial agriculture.[342] The Oklahoma legislature passed a similar constitutional amendment, but differences in the House and Senate versions were not reconciled in time to place it on the November ballot.[343] Missouri voters narrowly passed a Right to Farm constitutional amendment in August, 2014.[344] Although the enactment makes no reference to "modern" farm practices,[345] the political rhetoric preceding the election claimed the amendment would protect industrial agriculture, pitting it against smaller and organic farms.[346]

One commentator[347] contends that the movement for constitutional rights to farm is fundamentally different than the earlier push for statutory nuisance protections.[348] Whereas conflicts between farmers and their neighbors prompted statutory rights to farm, perceived conflicts between in-state interests and out-of-state interests provide the impetus for constitutional

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https://www.michfb.com/MI/News/Press_Releases/Statement_RE_Changes_to_Right_to_Farm_GAAMPs/.

340. *See, e.g.*, Carolyn Orr, *First-Of-Its-Kind 'Right to Farm' Law Now Part of North Dakota Constitution*, CSG MIDWEST (Jan. 2013) (emphasis added), *available at*: http://www.csgmidwest.org/policyresearch/0113righttofarm.aspx. *See also* Wilson, *supra* note 141, at 333.

341. N.D. CONST. art. XI, § 29.

342. Brooke Jarvis, *A Constitutional Right to Industrial Farming?*, BLOOMBERG BUSINESSWEEK (Jan. 9, 2014), http://www.businessweek.com/articles/2014-01-09/industrial-farming-state-constitutional-amendments-may-give-legal-shield.

343. Ron Hayes, *Right to Farm Amendment in Missouri Passes by 2,500 Votes,* OKLA. FARM REPORT (Aug. 6, 2014), http://www.oklahomafarmreport.com/wire/news/2014/08/00108_MissouriAmendmentOnePasses08062014_054707.php#.U—1ZEiLlTw.

344. *Id.*

345. *See* H.R.J. Res. 11 & 7, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013), *available at* http://www.sos.mo.gov/elections/2014ballot/HJRNos117.pdf.

346. *See Missouri Right-to-Farm, Amendment 1 (August 2014),* BALLOTPEDIA, http://ballotpedia.org/Missouri_Right-to-Farm,_Amendment_1_%28August_2014%29 (last visited Oct. 13, 2014).

347. Ross H. Pifer, *Right to Farm Statutes and the Changing State of Modern Agriculture*, 46 CREIGHTON L. REV. 707 (2013).

348. *See supra* notes 8-10 and accompanying text.

amendments.[349] Proponents argue that such measures are necessary to protect a continued food supply.[350] Opponents see them as attempts by agribusiness to combat the legislative agenda of animal welfare groups,[351] and to exempt itself from legitimate regulation.[352] Because these new constitutional protections are so recent, they have not yielded any conflicts to analyze at this point. Certainly, designating the right to engage in "modern" farming as a fundamental right, on par with free speech and religion, merits future research on the implications of this newest protectionist effort.

VII. CONCLUSION

In 2012, one commentator opined that, despite almost a decade of criticism for food disparagement laws, their continued presence on the books of twelve states could embolden these state legislatures and others to initiate new forms of protectionism.[353] The latest generation of ag-gag laws and constitutional rights to farm, seems to confirm that prediction. These, along with a ten-figure food libel claim that has survived a motion to dismiss and will be heard by a jury, put free speech regarding food safety and farm policy at risk. A proposal to preempt stringent state animal rights laws or agriculture constraints reflects an atmosphere that does not bode well for food safety. Ultimately, court intervention on the constitutional rights at issue in these matters may be necessary to stem the tide of agricultural protectionism.

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349. Pifer, *supra* note 347, at 719.

350. *See Missouri Farming Rights Amendment*, MO. FARMERS CARE, http://mofarmerscare.com/farming-rights-amendment/ (last visited Oct. 13, 2014).

351. *See* Pifer, *supra* note 347, at 716-17. *See also* Brent Haden, *The Right to Farm Amendment – A Perspective by Attorney Brent Haden*, MO. FARMERS CARE (Oct. 23, 2013), http://mofarmerscare.com/the-right-to-farm-amendment-a-perspective-by-attorney-brent-haden/; *Oklahoma Right to Farm Amendment Clears First Hurdle*, PROTECT THE HARVEST, http://protecttheharvest.com/oklahoma-right-farm-amendment-clears-first-hurdle/ (last visited Oct. 13, 2014) (quoting Rep. Scott Biggs, author of Oklahoma's proposed amendment as saying, "Like it or not, agriculture is under attack from some of these animal rights groups.").

352. *See, e.g.*,Quentin Hope, *States Ponder the "Right to Farm"*, HIGH PLAINS PUB. RADIO (June 4, 2013, 8:01 PM), http://hppr.org/post/states-ponder-right-farm.

353. Cain, *supra* note 12, at 310.